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No. 84-6270

# In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHNNY GREEN, ET AL., ETC., PETITIONERS

*v.*

AGNES MARY MANSOUR, Director, Michigan Department of Social Services, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 16, 1985
CERTIORARI GRANTED APRIL 1, 1985

187 PP

## TABLE OF CONTENTS


| | Page |
|---|---|
| Index to Joint Appendix | II |
| Documents in the Stepparent Case (*Banas* v. *Dempsey*) | 1 |
| Documents in the Child Care Case (*MWRO* v. *Dempsey*) | 49 |
| Oral Argument Transcript References | 149 |
| State Rules and Regulations | 152 |
| The Sixth Circuit's Orders | 156 |

# INDEX TO JOINT APPENDIX


| Description of Item | Record Entry No. | Appendix Page |
|---|---|---|
| I. *The Stepparent Case—Banas v. Dempsey* | | |
| Docket Entries for Civil Action No. 81-60077 | | 1 |
| Complaint (filed 5/11/81), deleting Exhibit #1 | R. 1 | 4 |
| Affidavit of John T. Dempsey (filed 6/16/81) | R. 3 | 22 |
| Order Granting Preliminary Injunction (filed 6/29/81) | R. 10 | 25 |
| Transcript of Oral Opinion Granting the Preliminary Injunction (filed 7/16/81) | R. 17 | 28 |
| Stipulation to Amend Order Granting Preliminary Injunction (filed 10/21/81) | R. 21 | 33 |
| Order Amending Preliminary Injunction (filed 10/21/81) | R. 23 | 35 |
| Memorandum Opinion and Order (filed 6/23/82) | R. 31 | 36 |
| Judgment (filed 6/28/82) | R. 33 | 48 |
| II. *The Child Care Case—MWRO v. Dempsey* | | |
| Docket Entries for Civil Action No. 81-60077 | | 49 |
| Complaint (filed 4/11/80) | R. 1 | 53 |
| Defendant's Answer with Affirmative Defenses and Exhibits (filed 6/3/80) | R. 9 | 73 |

| Description of Item | Record Entry No. | Appendix Page |
|---|---|---|
| Excerpts from Exhibits of Plaintiffs' Second Supplemental Brief in Support of Class Motion (filed 7/28/80): Department of Social Services Memorandum re: Child Care Deduction (Ex. A) Assistant Payments Manual Bulletin 80-16 re: Child Care Deduction (Ex. B) Assistance Payments Manual Bulletin 80-14 (Ex. C) | R. 12 | 87 |
| Memorandum and Order Denying Class Certification (filed 1/9/81) | R. 16 | 104 |
| Intervenor Complaint (filed 2/13/81), deleting Exhibits A-F, keeping Exhibits G and H | R. 20 | 109 |
| Order Granting Intervention For Johnny Green (filed 4/10/81) | R. 27 | 125 |
| Order Granting and Denying Motion to Dismiss (filed 4/15/81) | R. 28 | 127 |
| Plaintiffs' Summary Judgment Brief (filed 1/29/81) excerpts: Declaration of Johnny Green | R. 33A | 129 |
| Defendant's Answer to Intervenor Complaint (filed 2/20/82) | R. 40 | 133 |
| Memorandum Opinion and Order (filed 6/23/82) | R. 46 | 141 |
| Judgment (filed 6/25/82) | R. 48 | 148 |

| Description of Item | Record Entry No. | Appendix Page |
|---|---|---|
| III. *Oral Argument Transcript References* | | |
| Stepparent Case (4/13/82) William Burnham pp. 17-18 | | 149 |
| Child Care Case (3/9/82) William Burnham pp. 12-14 | | 150 |
| IV. *State Rules and Regulations* | | |
| MAC R 400.902 | | 152 |
| MAC R 400.903 | | 153 |
| MAC R 400.904 | | 154 |
| MAC R 400.918 | | 155 |
| V. *The Sixth Circuit's Orders* | | |
| Court of Appeals Opinion | | 156 |
| Judgment | | 179 |
| Order Denying Re-Hearing | | 181 |
| Order of the Supreme Court of the United States granting certiorari and leave to proceed in forma pauperis | | 182 |

## I. THE STEPPARENT CASE— BANAS v. DEMPSEY

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## UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

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Civil Action No. 81-60077

CAROL BANAS

*v.*

JOHN T. DEMPSEY

---

### RELEVANT DOCKET ENTRIES

| Date | Proceedings |
|---|---|
| 1981 | |
| May 11. | Complaint filed. Summons Issued. |
| May 28. | Pltf's Motion for Preliminary Injunction |
| Jun 3 | Notice of hrg. re: pltf's motion for preliminary injunction will be hrd. on 6/16/81 at 3:00 p.m. |
| June 16. | Affidavit of John T. Dempsey |
| June 16 | Deft's Brief in opposition to Motion for Preliminary Injunction |
| June 16. | Affidaivt of Carol Drake |
| June 16 | Pltf's Motion for Class certification |
| Jun 29 | Order granting preliminary injunction. Taylor, J |

| Date | Proceedings |
|---|---|
| 1981 | |
| Jun 30. | Deft's Motion for Stay of Enforcement of Order granting Preliminary Injunction w.b.a. and notice of hearing set for July 2, 1981 |
| Jul 1 | Notice of hearing on motion for stay of enforcement of order granting preliminary injunction set for 8/3/81 at 9:30 am, Taylor, J |
| Jul 1. | Deft's Notice of Appeal |
| July 7. | Transcript of June 16, 1981 |
| Aug 3. | Deft's Motion to stay denied. Taylor, J |
| Aug 6. | Order denying stay pending appeal Taylor, J |
| Oct 21. | Stipulation to amend Order granting Preliminary Injunction |
| Oct 27. | Order from CCA appeal dismissed. |
| Oct 21. | Order amending preliminary Injunction Taylor, J |
| Dec. 29 | ORDER OF REASSIGNMENT TO ANN ARBOR. Feikens, J. |
| 1982 | |
| Jan. 29 | Pltfs' Notice of Hearing for MOTION for Class Certification set for 3/16/82 @ 2:30, PS. |
| Feb 24 | Pltf's Notice of Hearing for MOTION for Class Certification & MOTION for Summary Judgment set for 4/13/82 @ 2:30, |
| Mar. 19 | Deft's MOTION to Dismiss, BA, Exhibits, & PS. Notice of Hearing set for 4/13/82 @ 2:30. |
| Apr. 1 | Pltf's Brief in Opposition to MOTION to Dismiss, Attachments & PS. |
| Apr. 9 | Pltfs' MOTION for Summary Judgment, BA, Aff. of Edward Hoort, Exhibits & PS. No Hearing scheduled. |

| Date | Proceedings |
|---|---|
| Apr. 13 | Deft, Dept. of Social Service's Brief in Opposition to MOTION for Class Certification and in opposition to plft's MOTION for SJ, Exhibits & PS. |
| Apr. 13 | Pltf's Motion for SJ hrd/TAKEN UNDER ADVISEMENT |
| | Deft's Motion to Dismiss hrd/TAKEN UNDER ADVISEMENT |
| | Pltf's Motion for Class Certification hrd/TAKEN UNDER ADVISEMENT |
| June 23 | MEMORANDUM OPINION and Order granting deft's Motion to dismiss and Dismissing Pltf Mot S/J and Joiner, J Mot. for Class Certification is moot. |
| June 23 | JUDGMENT—That Pltfs' take nothing, and that the action be dismissed on the merits, with prejudice. |
| July 22 | Pltfs' Notice of Appeal from final judgment entered on 6/22/82. |

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

---

No. 81-71494

CAROL BANAS, MICHAEL K. KELLEY, LINDA I. KELLEY, AMELIA VAN BURGER, TERESA E. COVEYOU, MARY MADELENE JONES, JOHN J. KIEVER, GILDA MILLS and JUDGE MILLS, on behalf of themselves, their children, and all others similarly situated, PLAINTIFFS

*v.*

JOHN T. DEMPSEY, individually and in his official capacity as Director of the Michigan Department of Social Services, DEFENDANT

---

## COMPLAINT

1.) Plaintiffs bring this action to enjoin the Defendant from terminating the benefits of recipients of Aid to Families with Dependent Children (AFDC) because the Defendant presumes the income and resources of a stepparent to be available for the stepchildren. This action by the Defendant is in direct violation of several statutory mandates, several federal regulations, and two provisions of the United States Constitution.

## JURISDICTION

2.) The jurisdiction of this Court is invoked pursuant to 42 USC 1983 and its jurisdictional counterpart, 28 USC 1343 and 28 USC 1331. Declaratory and injunctive relief is sought pursuant to 28 USC 2201 and 2202.

## PARTIES

3.) Plaintiff Carol Banas is a recipient of AFDC and currently resides in Madison Township, Michigan.

4.) Plaintiff Banas, is responsible for the support and custody of her three children, Ronald Bevan Jr., Kristine Bevan and Wendy Bevan.

5.) Plaintiffs Michael and Linda Kelley are residents of Wayne County, Michigan. Linda is a recipient of AFDC.

6.) Linda Kelley is responsible for the support and custody of her four children, Mark O'Brien, Jennifer O'Brien, Amanda O'Brien and Jacob O'Brien.

7.) Plaintiff Amelia Van Burger is an AFDC recipient and resident of Eaton County, Michigan.

8.) Plaintiff Van Burger is responsible for the support and custody of her children, Vanessa and Valerie Megenuph.

9.) Plaintiff Van Burger is also jointly responsible with her husband James Van Burger for the support of their child Seth Van Burger.

10.) Plaintiff, Teresa Coveyou is a recipient of AFDC and a resident Emmett County, Michigan.

11.) Plaintiff Coveyou is presently responsible for the support and custody of her children Teresa Sabin, Dorothy Sabin, Johnny Sabin, Gordon Sabin Jr., Robert Sabin and David Sabin.

12.) Plaintiff Coveyou and her husband, Jan Coveyou are responsible for the support and custody of Terrence Coveyou and Eric Coveyou.

13.) Plaintiff Mary Madelene Jones is a recipient of AFDC and a resident of Wayne County, Michigan.

14.) Plaintiff Jones is responsible for the support and custody of her children, Stanley Barnes, Keith Barnes, Dante Barnes, Aaron Barnes, and Joseph Barnes.

15.) Plaintiff John J. Kiever is a recipient of AFDC and a resident of Kent County, Michigan.

16.) Plaintiff Kiever is responsible for the support and custody of his children Dana Kiever, Terry Kiever, Patrick Kiever, and Cherie Kiever.

17.) Plaintiffs Gilda and Judge Mills are residents of Washtenaw County, Michigan. Gilda is a recipient of AFDC.

18.) Plaintiff Gilda Mills is responsible for the support and custody of her children, Laytona Caston and Kanisha Caston. Plaintiffs Gilda and Judge Mills are jointly responsible for the support and custody of their twins, Jolena and Jovan Mills.

19.) Defendant John T. Dempsey is the Director of the Michigan Department of Social Services and as such is responsible for the policies, practices and administration of the AFDC program.

## CLASS

20.) Plaintiffs bring this action on behalf of themselves, their children and the class of all persons similarly situated. The class consists of all persons who live in households which will have their AFDC benefits terminated or reduced because of the presence of a stepparent.

21.) The class consists of two subclasses, those AFDC recipients who will have their benefits terminated or reduced because of the presence of a stepparent in the home, and a second subclass consisting of those stepparents who are married to AFDC recipients.

22.) The class and subclass are so numerous that joinder of all members is impracticable.

23.) There are questions of law or fact common to the class and subclasses.

24.) The claims or defenses of the representative are typical of the claims and defenses of the class and subclasses.

25.) The named plaintiffs will fairly and adequately protect the interests of the class and subclass.

26.) The parties opposing the class have acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive and declaratory relief with respect to the class as a whole.

## FACTS

27.) Plaintiff, Carol Banas was married in August of 1977 to James W. Banas.

28.) Plaintiff Banas has three children by a previous marriage, Ronald Bevan Jr., Kristine Bevan, and Wendy Bevan.

29.) Plaintiff Banas receives AFDC and Medicaid benefits for her children. She does not receive any assistance for herself.

30.) Plaintiff's husband, James Banas is employed as an appliance salesman and currently averages a gross income of $275.00 per week. He has work expenses which average $300 per month.

31.) Plaintiff Banas' children have costly medical conditions including allergy and spinal problems.

32.) Plaintiff Banas will suffer extreme financial hardship if she can no longer receive AFDC for her children.

33.) Plaintiff Banas may be unable to provide medical care for her children if she can no longer receive Medicaid for her children.

34.) Plaintiffs Michael and Linda Kelley were married in July of 1980.

35.) Plaintiff Linda Kelley has four children by a previous marriage; Mark O'Brien, Jennifer O'Brien, Amanda O'Brien and Jacob O'Brien.

36.) Plaintiff, Linda Kelley receives AFDC and Medicaid benefits for her children. She does not receive any benefits for herself.

37.) Plaintiff Michael Kelley has two children from a previous marriage for whom he pays child support.

38.) Plaintiff Michael Kelley's first wife has remarried, but her husband is not legally responsible for the children.

39.) Plaintiff Van Burger was married to James Van Burger in 1973. They have one child Seth Van Burger.

40.) Plaintiff Van Burger has two children by a previous marriage; Vanessa Megenuph and Valerie Megenuph.

41.) Plaintiff Van Burger receives AFDC and Medicaid for the two Megenuph children. She does not receive any benefits for herself.

42.) Plaintiff Van Burger, provides for the support of the two Megenuph children without assistance from Mr. Van Burger.

43.) Plaintiff Van Burger will suffer severe financial hardship if she can no longer receive AFDC and Medicaid for her children.

44.) Plaintiff Teresa Coveyou, is married to Jan Coveyou.

45.) Plaintiff Coveyou has seven children by a previous marriage, Teresa Sabin, Dorothy Sabin, Johnny Sabin, Gordon Sabin, Jr., Robert Sabin, David Sabin and Sandra Sabin.

46.) Plaintiff Coveyou receives AFDC and Medicaid benefits for the first 6 children listed above. Sandra Sabin does not receive benefits as she does not live in the household. Plaintiff Coveyou does not receive any benefits for herself.

47.) In addition to the Sabin children, Jan Coveyou has two children who reside in the household.

48.) Jan Coveyou contributes to the support of three of his children who do not live in the household.

49.) Plaintiff Coveyou contributes to the support of one of her children who does not live in his household.

50.) Plaintiff Coveyou's husband is employed with a gross income at approximately $15,000 per year. He has work expenses of approximately $930 per year.

51.) Plaintiff Coveyou is suffering grave financial difficulties and marital disharmony as a result of Defendant's policies.

52.) Plaintiff Jones was married to Stanley Allen in October of 1980.

53.) Plaintiff Jones receives AFDC and Medicaid benefits for her children. She does not receive any benefits for herself.

54.) Mr. Allen does not financially support Plaintiff Jones' children, and will terminate the marriage if he is required to do so.

55.) Plaintiff Jones will suffer great financial hardship and the loss of her marriage if Mr. Allen is required to support her children.

56.) Plaintiff John Kiever is currently married to Ivena Kiever.

57.) Plaintiff Kiever has four children from a previous marriage, Dana Kiever, Terry Kiever, Patrick Kiever and Cherie Kiever.

58.) Plaintiff Kievers' wife is employed, but she refuses to reveal her income to Plaintiff.

59.) Plaintiff Kiever's wife refuses to contribute to the support of the Plaintiff's children.

60.) Plaintiff Kiever's family will be destroyed through divorce or separation if Plaintiff's wife is forced to support his children because of the actions of the Defendant.

61.) Plaintiff Kiever is unable to provide support for his children because of the actions of the Defendant.

62.) Plaintiffs Gilda and Judge Mills were married in June of 1980.

63.) Plaintiff Gilda Mills has two children who are not the children of Judge Mills, Layton Caston and Kanisha Caston.

64.) Plaintiffs Gilda and Judge Mills have two children, Julena and Jovan Mills, born April 6, 1981.

65.) Plaintiff Gilda Mills receives AFDC and Medicaid benefits for Laytona and Kanisha Caston. No benefits are received for any other member of the household.

66.) Plaintiff Judge Mills is employed as a maintenance worker, and receives a net income of $867.00 per month.

67.) Plaintiff's Gilda and Judge Mills will suffer severe financial hardship if Defendant is allowed to terminate their AFDC and Medicaid.

68.) Public Act No. 480, an act to amend Section 2 of the Michigan Poor Law MCLA 401.2, (hereafter referred to as "Act 480) was approved on January 20, 1981, and requires that

> the stepparent of a dependent child who lives in the same household as the dependent child being of sufficient ability, shall . . . support the dependent child, in the manner approved by . . . the department of social services. . . .

69.) Section 1 of the Michigan Poor Law, MCLA 401.1, defines a "dependent child" to mean "a poor person under 18 years of age." A "poor person" is defined in the same section in relevant part as "a person who. . . is eligible to receive relief or assistance granted under the provisions of the Social Welfare Act.

70.) Based upon the provisions of Act 480, the Defendant Dempsey promulgated policy applicable to Michigan's AFDC program which require that AFDC eligibility or grant levels of stepchildren under the age of 18 who live in the same household as their stepparent, be determined after considering the income and resources of such stepparent, regardless of whether such income or resources are in fact being made actually available to such stepchildren. See Assistance Payments (AP) Manual Bulletin 81-5 and revised Item 208 transmitted therewith, attached to this Complaint as Exhibit 1.

71.) In addition to deeming income and resources available, Item 208 does not allow stepparents to deduct the actual costs of producing earned income and does not provide for any work incentive disregard of portions of earned income, as are normally allowed for all other caretaker relatives whose needs and income are considered in determining eligibility and grant levels for AFDC.

72.) Plaintiffs, who are all parents and stepparents of dependent children whose eligibility is to be determined or amount of AFDC benefits reduced as a result of Act 480 and Defendant's policies promulgated thereunder, face

immediate and irreparable harm if Defendant's policies are not enjoined by this Court.

## FIRST CLAIM FOR RELIEF

73.) Defendant is required by federal law to aid all children defined as "dependent children" according to federal standards. 42 USC § 606, § 607, and § 602(a)(10).

74.) Federal law requires that, in determining financial eligibility and the amount of assistance for a dependent child, Defendant must count only such net income and resources as are actually available for the support of such child. 42 USC § 602(a)(7); 45 CFR § 233.90(a)(1) and 45 CFR § 233.20(a)(3)(ii)(D) (1980).

75.) Whether in determining financial need or categorical eligibility of a dependent child, Defendant may not assume the availability of income or resources of a stepparent unless such a stepparent is legally obligated to support his or her stepchildren

> under a state law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children.

45 CFR § 233.90(a)(1) (1980).

76.) Act 480, amending MCLA 401.2 does not impose a legal obligation of the sort contemplated by the Social Security Act and regulations; therefore AP Manual Bulletin 81-5 and Item 208 violate the cited provisions of the Social Security Act and regulations.

## SECOND CLAIM FOR RELIEF

77.) Act 480 proports to impose a duty of support upon stepparents who live in the same household as a "dependent child," defining such a child to be a child eligible AFDC or other "relief or assistance granted under . . . sections 400.1 to 400.121 of the Michigan Compiled Laws," the Social Welfare Act.

78.) As a result of Act 480, a support obligation is imposed upon persons who are married to natural or adoptive parents of children eligible for AFDC, but no such support obligation is imposed upon persons who are married to natural and adoptive parents whose children are not eligible for AFDC.

79.) Act 480 thereby violates the rights of stepparents of "dependent children" to equal protection of the laws by singling them out for special legal burdens without any rational basis therefor.

80.) Because Act 480 is unconstitutional and therefore void, the obligation imposed by it does not qualify as a "legal" one under 45 CFR § 233.90(a)(1)(1980); consequently Defendant's policies, set forth in AP Manual Bulletin 81-5 and Item 208, violate the sections of the Social Security Act and regulations set forth in the First Claim for Relief.

## THIRD CLAIM FOR RELIEF

81.) Act 480 purports to impose a support duty on "the stepparent of a dependent child who lives in the same household" and, based upon such support duty, the Defendant has promulgated welfare policy resulting in total or partial ineligibility of otherwise eligible dependent children based upon the stepparent's residence in the home and marriage to such children's mother.

82.) The only ways AFDC stepparents can avoid the said support duty and termination or reduction of the AFDC grant of the dependent children in the home are for the stepparent to move out of the home or obtain a divorce, or, in the event that the natural or adoptive parent and would-be stepparent are not yet married, to avoid getting married.

83.) The above financial and other pressures resulting from the operation of Act 480 and Defendant's Item 208 constitute an impermissible burden upon Plaintiffs' right of family privacy, right to marry and right of association guaranteed by the due process clause of the Four-

teenth Amendment and the First and Ninth Amendments, and serve to single out Plaintiffs for special treatment with respect to the exercise of their said privacy and associational rights without any rational basis in violation of their rights to equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

## FOURTH CLAIM FOR RELIEF

84.) Defendant's welfare policies generally allow dependent children and their caretaker relatives to deduct from gross earned income all actual expenses of producing that income and allow an earned income disregard for persons qualified to receive one. AP Manual Item 331.

85.) Item 208 purports to count 80% of the gross earnings of a stepparent and does not allow for any work expense deductions or earned income disregards.

86.) In the alternative to the other claims herein and in the event that it is determined that stepparents' income may be counted for AFDC purposes, Defendant's failure to allow earned income deductions and disregards violates 42 USC § 602(a)(7) and (8) and the federal regulations thereunder and draws distinctions among persons included in the AFDC group without any rational basis, in violation of the equal protection clause of the United States Constitution.

WHEREFORE, Plaintiffs pray that this Honorable Court;

a. assume jurisdiction of this matter;

b. certify this action as a class action;

c. declare the Defendant's policies and practices as set forth above to be volative of federal statutory and constitutional provisions;

d. enjoin Defendant from continuing to enforce his policy regarding stepparents;

e. notify all members of the class of their rights to administrative review under state procedures;

f. award plaintiffs their costs and attorneys fees pursuant to 42 USC 1988; and

g. grant such further and equitable relief as this Court may find just in the circumstances.

Respectfully submitted,

/s/ William Burnham
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Wayne State University Law School
Detroit Michigan

/s/ Edward J. Hoort
EDWARD J. HOORT
Michigan Legal Services
Detroit, Michigan 48226

/s/ EDWARD J. HOORT (for)
PAUL D. REINGOLD
Legal Services of Southeastern Michigan
Ann Arbor, Michigan 48104

Dated: May 11, 1981

STATE OF MICHIGAN )
)
COUNTY OF INGHAM )

## AFFIDAVIT OF AMELIA VAN BURGER

Affiant, Amelia Van Burger, having first been duly sworn, hereby states as follows:

1. She is the mother of two children, Vanessa Megenuph, age 12, and Valerie Megenuph, age 11, who reside with her.

2. Prior to March 1981, she received an ADC grant from the Michigan Department of Social Services (herein after: MDSS) of $91.00 per month for each child. She received this assistance because of the absence of the children's natural father, Warren Megenuph.

3. She is married to James Van Burger, and they reside at 3646½ Third Street, Grand Ledge, Eaton County, Michigan. They have one child, Seth Van Burger, age 5, who resides with them. The two Megenuph children also reside with them at this address.

4. She received a letter from the Eaton County Department of Social Services (herein after: ECDSS) dated February 13, 1981 (attached hereto as appendix # 1) stating: "Act 480, P.A. 1980, amended the Poor Law to require that step-parents are responsible relatives to minor children living in the same home." This letter further stated: "Effective 3-1-81, A.P. Workers must include the step-parents' income and assets when determining a step childs' eligibility for ADC." This letter directed her to complete an enclosed MDSS application form providing information on her husband including his income and assets. She and her husband completed such application and returned it to the ECDSS.

5. She received a form DSS-176 from the ECDSS dated February 24, 1981 (attached hereto as appendix # 2) notifying her that the two Megenuph children's assistance

under the ADC program would be cancelled effective March 10, 1981.

6. The reasons given on this DSS-176 form for this cancellation were: "Act 480, P.A. 1980, amended the Poor Law to require that step-parents are responsible relatives to minor children living in the same house. The value of your non-exempt property is higher than the maximum allowed for this program."

7. Upon contacting the ECDSS, she was informed that, based upon the information provided in the recently submitted MDSS application, the eligibility of the Megenuph children for ADC and Medicaid assistance was terminated.

8. She was informed by the ECDSS that the eligibility of the Megenuph children for ADC and Medicaid assistance was calculated as follows:

(a) The ADC assistance for the two Megenuph children prior to March, 1981, was $91.00 per month for a total of $182.00 per month.

(b) The income of James Van Burger was determined to be $300.00 per week for a total of $1,200 per month.

(c) 20% of Mr. Van Burger's income was disregarded leaving a balance of $960.00 per month considered available to him.

(d) The amount of Mr. Van Burger's income necessary for the personal needs of himself, Mrs. Van Burger (the affiant) and their son, Seth Van Burger, was computed as $73.00 per month for each of them for a total of $219.00 per month.

(e) Allowance for shelter, heat, and utilities for Mr. and Mrs. Van Burger and Seth would be $160.00 per month for shelter, $77.00 per month for heat, and $33.00 per month for other utilities.

(f) Thus the total amount of Mr. Van Burger's income allowed for the personal needs, shelter, heat and utilities for himself, his wife, and their son was $489.00 per month.

(g) When this amount was deducted from Mr. Van Burger's income considered available to him of $960.00 per month, a remainder of $471.00 per month was considered available for Mr. Van Burger to support the two Megenuph children.

(h) Because this amount of $471.00 per month of available income exceded the $181.00 per month that the two Megenuph children were receiving in ADC assistance, these children were no longer eligible for their ADC assistance.

9. She was also informed that in the ADC application she recently submitted, it was stated that Mr. Van Burger had a $3,000.00 savings account solely in his own name.

10. Because this savings account exceded the $2,000.00 asset limit for receipt of ADC assistance, and because Mr. Van Burger's assets were considered in determining the ADC eligibility of the two Megenuph children, these children would no longer be eligible for their ADC assistance.

11. She was informed by the ECDSS that because the two Megenuph children were no longer eligible for ADC assistance, they would also no longer receive Medicaid assistance.

12. She was never informed that Mr. Van Burger's actual work related expenses or his mandatory payroll deductions could be considered in calculating the eligibility of the two Megenuph children for ADC and Medicaid assistance.

13. In calculating the eligibility of the two Megenuph children for ADC and Medicaid assistance, no consideration was given of the actual expenses and obligations incurred by Mr. Van Burger for shelter, heat, and other utilities.

14. She and Mr. Van Burger were married in 1973 and the two Megenuph children have resided with them since then. In that period she has had the responsibility of supporting the two Megenuph children without assistance from Mr. Van Burger.

15. The termination of the ADC and Medicaid assistance for the two Megenuph children is a severe handicap and will cause many difficulties in providing adequate support for herself, Mr. Van Burger, Seth Van Burger and Vanessa and Valerie Megenuph.

Further Affiant sayeth not.

/s/ Amelia Van Burger
AMELIA VAN BURGER

Subscribed and sworn to before me this —— day of March, 1981.

/s/ Kathryn E. Berry
Notary Public Clinton County
State of Michigan
My Commission expires June 11, 1984

STATE OF MICHIGAN
DEPARTMENT OF SOCIAL SERVICES
JOHN T. DEMPSEY, *Director*

Feb. 13, 1981

Amelia S Vanburger
3646 ½ Third St
Grand Ledge MI. 48837

Act 480, P.A. 1980, amended the Poor Law to require that stepparents are responsible relatives to minor children living in the same home.

Effective 3-1-81, AP workers must include the stepparents' income and assets when determining a stepchilds' eligibility for ADC. Although stepparents must provide information regarding their income and assets in order to determine eligibility for their spouses and stepchildren, they may elect not to be included in the ADC group. Stepparents choosing to be included in the ADC group must meet all eligibility requirements.

In order to determine your continued eligibility it will be necessary for you to complete the enclosed application and return the application to this office no later than 2-27-81. When completing the application be sure to list all family members and answer all questions. A self-addressed, stamped envelope is enclosed for your convenience in returning the application.

When the completed application is received in our office, if additional information or verification is required, you will be contacted.

Yours Truly,

/s/ Nancy Foder
AP Worker
Eaton Co. Dept. Social Services

## CLIENT NOTICE

Michigan Department of Social Services

Amelia Van Burger
3646 ½ Third St.
Grand Ledge, Mi. 48837

*After careful review of your case, it has been determined* that the actions checked below will be taken.

☐ Your application for assistance under ———— program is denied.

☒ Your assistance under the ADC program will be cancelled effective 3-10-81.

☐ Your assistance under the ———— program will be cancelled effective ————, however, you remain eligible for Medical Assistance.

☐ Your ADC grant will be reduced to $———— per month effective ————; no change in your Medical Assistance.

☐ Your GA grant will be reduced to $———— per month effective ————; no change in your GA Medical.

☐ Your Medical Assistance is continued; however, the amount which you must pay to the long term care facility will be $———— per month beginning ————.

☐ You will receive a separate notice about changes in your eligibility for other programs.

☐ Other (specify) ————.

The above action is being taken for the following reason: "Act 480, P.A. 1980, amended the Poor Law to require that stepparents are responsible relatives to minor children living in the same home." The value of your non-exempt property is higher than the maximum allowed for this program.

Manual policy reference: AP Item(s) 208,211 GA Chapter(s) ———— MAE Item(s) ————.

If your assistance is being denied or cancelled, you may reapply for assistance if your circumstances change.

If you do not understand why the above action is being taken, please contact me. If you wish, you may meet with me and my supervisor to discuss the reason for the action.

If you feel the action is incorrect, you have the right to a hearing. You may request a hearing within 90 days of the date of this letter. SEE THE OTHER SIDE OF THIS LETTER FOR INSTRUCTIONS FOR REQUESTING A HEARING. If you are currently receiving assistance and you request a hearing before 3-10-87, your assistance will continue at its present level at least until the hearing takes place.

AP Worker—[Illegible]

Telephone Number—343-0860

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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**AFFIDAVIT OF JOHN T. DEMPSEY**

STATE OF MICHIGAN )
) ss:
COUNTY OF WAYNE )

JOHN T. DEMPSEY, being first duly sworn, deposes and says as follows:

1. That he is the Director of the Michigan Department of Social Services.

2. That this affidavit is made on the personal knowledge of affiant, John T. Dempsey, who if sworn as a witness can testify competently to the facts contained herein.

3. That he is submitting this affidavit in opposition to Plaintiffs' motion for preliminary injunction in the above-captioned matter.

4. That as Director of the Department of Social Services, affiant is charged with the responsibility of administering the Aid to Families with Dependent Children (AFDC) and medical assistance (Medicaid) programs in Michigan as well as insuring that the Department does not spend in excess of the funds appropriated to it by the state legislature each fiscal year.

5. That on April 1, 1980, the Department implemented an essential person's policy in AFDC for needy spouses of eligible caretaker relatives. These individuals, which includes stepparents, are not eligible for AFDC in their own right but are considered by the state as essential for the well-being of the child recipient. As such, they may

have their needs and their resources considered in the determination of the family's AFDC benefit.

6. That on January 20, 1981, the Governor signed Act 480, an amendment to the Michigan Poor Law. This act requires stepparent, who lives in the same home as the dependent child, to contribute to the support of that child. Policy implementing Act 480 was developed and given an effective date of February 15, 1981 for active cases and March 1, 1981 for new cases.

7. That in anticipation of the passage of a stepparent responsibility law, the Legislature reduced the department's appropriation for FY 1980-81 by $16.8 million, out of which $8.4 million are state dollars. This reduction was predicated on the assumptions that the new stepparent policy would close 13,743 AFDC cases and that the savings from these closures would accrue beginning January 1, 1981.

8. Since the policy was implemented, the Department estimates that it has saved from grant reductions, case closures and new cases where eligibility was denied a total of approximately 3.6 million dollars through May 31, 1981. During the same time period, the Department estimates that the essential persons policy when applied to stepparents has increased expenditures by approximately 0.8 million dollars. This leaves an overall cost savings of about 2.8 million dollars or .93 million dollars per month.

9. That projecting the cost saving estimates for the remainder of the fiscal year, or an additional four months at the estimated rate of savings would provide additional savings of approximately 3.72 million dollars for a total projected fiscal year savings of about 6.5 million dollars leaving a shortfall from the budgeted figure of 10.3 million dollars.

10. That Mich. Const. art. IX, § 17, requires that, "[n]o money shall be paid out of the state treasury except in pursuance of appropriations made by law.

11. That the funds appropriated for FY 1980-1981 to the Department of Social Services are already insufficient

to meet current and projected expenditures for the fiscal year. This budgetary shortfall has already required the Department to take the following actions relating to the AFDC program in 1981 to live within appropriated funding:

a) recision of 1979 AFDC heating allowance increase January, 1981.

b) 2½ ratable reduction in AFDC payment standards effective April 1, 1981

c) additional 5% ratable reduction in AFDC payment standards effective June 1, 1981

12. That if this Court were to enjoin the Department's implementation of Act 480 through its policy contained in AP Manual Item 208, affiant has been advised by Gerald Miller, Director, Department of Management and Budget that supplemental appropriations requests are not to be made and as a result affiant has taken the action, with the approval of the legislative appropriations committees of ratably reducing AFDC standards as described above.

13. That, to offsset the fiscal impact of a preliminary injunction in this case an additional ratable reduction of 4.7% in AFDC payment standards for FY 1980-81 would be required (such ratable reduction could not go into effect until August 1, 1981).

/s/ John T. Dempsey
JOHN T. DEMPSEY
Director
Michigan Dept. of Social Services

Subscribed and sworn to before me
this —— day of June, 1981

/s/ Illegible signature
Notary Public, ——— County,
Michigan
My commission expires: ————

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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[Title Omitted in Printing]

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**ORDER GRANTING PRELIMINARY INJUNCTION**

At a session of said Court held in the
City of Detroit, Michigan, on the ——
day of June, 1981.

PRESENT: Honorable Anna Diggs Taylor
U.S. District Judge

The Court having before it Plaintiffs' motion for preliminary injunction, brought pursuant to Rule 65 of the Federal Rules of Civil Procedure, and having heard oral arguments of the parties and read the briefs and affidavits submitted by the parties, and having issued an oral opinion on June 16, 1981 containing the findings of fact and conclusions at law, recited in part below, as required by Rule 52 of the Federal Rules of Civil Procedure;

The Court finds as follows:

1) Plaintiffs have shown a strong or substantial likelihood of success on the merits inasmuch as it appears that Public Act 480 of 1980, MCLA 401.2 and the Defendant's policy as found in Assistance Payments Manual Item 208, require the assumption of income from a stepparent for the purpose of calculating Aid to Families with Dependent Children (AFDC) benefits and it appears that presuming income to be available for such purpose is violative of 42 U.S.C § 602(a)(7) and the regulations promul-

gated thereunder, 45 C.F.R. 233.90(a)(1) because Public Act 480 of 1980, MCLA 401.2 is not a law of general applicability which legally obligates stepparents to support their spouse's children to the same extent that natural and adoptive parents are obligated to support their natural and adoptive children.

2) Plaintiffs have shown irreparable harm absent injunctive relief as evidenced by the loss of monetary benefits, medical care and the inability of this Court, under the Eleventh Amendment to the United States Constitution, to award retroactive benefits to be paid.

3) The issuance of the injunction will not cause substantial harm to others which could not have been anticipated by Defendant in adopting said policy.

4) Public policy as expressed by the United States Congress and the Department of Health and Human Services would best be served by the issuance of this injunction.

IT IS HEREBY ORDERED that, pending the final resolution of this case on its merits or until further order of the Court, the Defendant is preliminarily enjoined from assuming the availability of stepparent's income for the purpose of calculating AFDC benefits pursuant to Assistance Payments Manual Item 208.

IT IS FURTHER ORDERED that Defendant be and is hereby preliminarily enjoined from terminating, reducing, or denying AFDC or Medicaid benefits by reason of the assumption of the availability of stepparent's income to applicants or recipients of such benefits from and after the effective date of this order.

IT IS FINALLY ORDERED that Defendant, beginning in and for the month in which this order takes effect shall take the following actions:

(A) Reinstate all AFDC and Medicaid cases heretofore terminated because of the above enjoined policy;

(B) Raise all AFDC and Medicaid grants reduced because of the enjoined policy to their appropriate levels, and

(C) Re-evaluate the eligibility of AFDC and Medicaid applicants who were denied benefits solely by reason of the Defendant's use of Assistance Payments Manual Item 208 as modified because of the passage of 1980 PA 480.

/s/ Anna Diggs Taylor
Hon. ANNA DIGGS TAYLOR
U.S. District Judge

APPROVED AS TO FORM:

/s/ Edward J. Hoort
EDWARD J. HOORT

/s/ Robert N. Rosenberg
ROBERT N. ROSENBERG

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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**TRIAL PROCEEDINGS BEFORE JUDGE TAYLOR ON JUNE 16, 1981**

* * * *

[2] THE COURT: The Court will enter a preliminary injunction as requested by the plaintiffs in this matter and will at this time outline its findings of fact and conclusions of law in which it is basing its order.

It appears undisputedly that on March 1, 1981, defendant John Dempsey effectuated a policy in the Michigan Department of Social Services to enforce and implement certain state legislation which is Public Act 480 of 1980 being MCLA Section 402.1.

That statute required, as does the policy, that step-parents be deemed responsible for the support of the child under eighteen who would be eligible for welfare and who lives in the same household as the step-parent. The statute is entitled "An Amendment to the Michigan Poor Law".

The plaintiffs here assert that the departmental policy as implemented in the current Assistance Manual, Item number 208 apparently is in violation of 42 USC Section 602(a)(7) and the regulations which the Department of Health and Human Services have promulgated pursuant to 45 C.F.R. Section 223.90(A)(1).

Plaintiff has requested an injunction [3] preventing the defendant from withholding any benefits pursuant to this new policy.

The suit is brought pursuant to 42 USC 1983, and alleges violation of the Federal Social Security Act, Equal Protection guarantees of our Constitution, violation of the right to family privacy. And the Court finds that it has jurisdiction under 28 USC 1343, 1331, 2201 and 2202.

The Court finds first that on the matters which are before the Court today, (and it must acknowledge it only received the defendant's brief this morning) and although the parties have argued extensively, there is a possibility of the law becoming clarified in a different direction later. But at this point, it appears highly likely that the plaintiffs will prevail on the merits.

42 USC section 602(a)(7) sets out the guidelines that the states are to follow in calculating income and resources of AFDC families.

Broadly, that statute declares that the income of a child being assisted shall be counted, insofar as that income is "actually available for current use".

The regulations promulgated, pursuant to the law, and most particularly, 45 C.F.R. section 233.20, are purposed to assure that the amount of the assistance actually paid is based on the individual's actual need.

[4] A state generally, the cases have held, may not presume the availability of income from an unrelated member of the household unless the income and the resources of that unrelated individual are in fact being made available to the AFDC child.

Two leading cases in the area are *King v. Smith* 392 US 309 and *Lewis v. Martin* 397 US 552.

In the *King* case the state of Alabama attempted to define any single or married able-bodied man, with whom an AFDC mother co-habited as a "substitute father", and proceeded to deny benefits to children in such homes on the basis of their not being deprived of a parent.

The Supreme Court has struck those regulations down as violative of the Social Security Act's definition of a parent.

After *King*, the Department of Health, Education and Welfare promulgated the rules on this subject which are here in litigation; in response to the Supreme Court's holding in *King*.

The regulation in essence provides that the presence of parental support can only be found, in the case of a step-parent, where the step-parent is lawfully married to the child's natural parent and is legally obligated to support the child under a state law of general applicability, [5] which requires the step-parent to support the step-child to the same extent that the natural or adoptive parents are required to support their children.

The case of *Lewis v. Martin* has reinforced the promulgations of Health, Education and Welfare; it was decided subsequent thereto and struck down California statutes somewhat similar—which this Court finds to be somewhat similar to the case here at bar in Michigan.

The Michigan statute, (the "Poor Law") the plaintiffs argue in this court, and this Court finds on the record before it, is not a statute of general applicability, but establishes duties of support which differ—and special welfare duties of support which differ from the normal duties of support which natural and adoptive parents have in the state of Michigan.

The Michigan statute provides that a step-parent of a step-child who lives in the same household as a step-child, being of sufficient ability, shall jointly or severally relieve, maintain and support the step-child in the manner approved by the county Department of Social Services on the county in which the poor person is settled or living.

It goes on to provide that the obligation of the step-parent may be enforced, by the county Department [6] making application to the Probate Court for an order to complet such relief through the prosecuting attorney.

The statute defines a dependent child as a poor person under eighteen years of age, and defines a poor person as one eligible to receive relief.

Therefore, the duty of a step-parent is limited to step-children under eighteen living in the home with the step-parent and, who are eligible for welfare.

In contrast, the duties of natural and adoptive parents in the State of Michigan are unrestricted and unconditional as stated at MCLA 722.31.

The Court will note particularly the distinctions between Public Law 480 and the policies promulgated by the defendant, and the obligations therein, and the laws of general applicability.

First, the step-parent is only obliged to contribute to the support if he is living in the same household with the child. The parental obligation follows a parent and is eternal.

Second, the step-parent is only obliged to support a child who otherwise eligible to receive relief under the program here in question.

Third, the step-parent, unlike a parent, must support its step-child in the manner approved by the County [7] Welfare Department and in a manner enforceable only by the Welfare Department.

All three differ from the obligations of natural or adoptive parents and all three aspects demonstrate that the Michigan support obligation, this statute and policy, are not even generally applicable to all step-parents.

And it is noteworthy further, that the obligation of Michigan AFDC step-parents will terminate by its terms —by the terms of the statute, in 1982.

The policy then, and the statute, and the actions taken pursuant thereto directed at plaintiffs in this lawsuit, are unlawful under federal law.

The irreparable harm to be suffered by plaintiff has been demonstrated first in the affidavit and statements of potential lost medical benefits which are only obtainable under the program, from which these children may be severed pursuant to the unlawful policy.

The Court is further advised that recent Court decisions following the Eleventh Amendment of the United

States Constitution, have made it apparent that there is no remedy at law for persons in plaintiffs' situation, in as much as the Court cannot later award retroactive benefits to the group here in question.

The Court further takes note of and gives its [8] attention to the affidavit of the plaintiffs who have made it apparent that a person living on these benefits is very close to the edge of survival, economic survival, at all, and that the loss is an irreparable loss when they are cut off from the program.

The public policy that this Court is to follow has been set out by our legislative body, and this Court notes that in this country that legislative body is the Congress. The United States Congress. And the Department of Health, Education and Welfare has promulgated regulations pursuant to Congress. It is not the policy of this country to draw step-parents into a welfare-specific obligation.

Defendant has mentioned the converse. The harm that will be suffered, the balance of harm that this Court should consider: Harm suffered by other beneficiaries of the Welfare program or the other recipients in the State of Michigan, if the Court were to enjoin actions taken here.

The Court realizes this is a very unfortunate situation. However, legislators and administrators and administrative officials advising our legislators, act at their peril when, in the face of clear federal regulations, case law and statutory law, they proceed to take actions which deprive a group of people, a clear group, of their Federal Rights.

So, the order will enter when presented.

* * * *

[Certificate of Reporter Omitted in Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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**STIPULATION TO AMEND ORDER GRANTING PRELIMINARY INJUNCTION**

The parties, by and through their respective counsel, hereby agree and stipulate as follows:

1. The June 26, 1981 preliminary injunctive order was based upon this Court's finding that defendant's policy of assuming the availability of income from a stepparent for purposes of calculating AFDC and Medicaid benefits appeared to be contrary to existing federal law.

2. That on August 13, 1981, President Reagan signed into law the Omnibus Budget Reconciliation Act of 1981, Public Law 97-35, copy attached as Exhibit "A", Section 2306(a) of which amends the Social Security Act, 42 USC § 602(a), effective October 1, 1981, to provide that income of stepparents living in the same household as the child shall be counted for the purposes of determining eligibility and amount of benefits for AFDC.

3. That as of October 1, 1981, the merits of the propriety of prospective injunctive relief based on the old state policy and state statute will become moot because of the enactment of the new mandatory federal stepparent provision and for that reason the parties agree, subject to the Court's approval, to modify the June 26th

Order so that it will no longer have prospective injunctive effect from and after October 1, 1981.

Dated: Sept. 14, 1981

/s/ Robert N. Rosenberg
ROBERT N. ROSENBERG
Assistant Attorney General
512 Commerce Center
Lansing, Michigan 48913

Dated: 10/16/81

/s/ Edward Hoort
EDWARD HOORT
900 Michigan Building
220 Bagley Avenue
Detroit, Michigan 48226

Dated: 10/16/81

/s/ Edward Hoort for
WILLIAM BURNHAM
468 W. Ferry
Detroit, Michigan 48202

Dated: 10/16/81

/s/ Edward Hoort for
PAUL REINGOLD
420 N. Fourth Street, Room 800
Ann Arbor, Michigan 48104

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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[Title Omitted in Printing]

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**ORDER AMENDING PRELIMINARY INJUNCTION**

The Court having received the Stipulation of the Parties, and it appearing that the Omnibus Reconciliation Act of 1981 has amended federal law in respect to this cause;

IT IS HEREBY ORDERED that the Preliminary Injunction issued by this Court on June 29, 1981 should have no prospective effect on and after October 1, 1981.

DATE: 10/21/81

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HONORABLE ANNA DIGGS TAYLOR
District Judge

Approved as to form and content

/s/ EJH as per phone conversation 10/14/81 for
ROBERT ROSENBERG
Assistant Attorney General
512 Commerce Center Building
Lansing, MI 48926
(517) 373-7700

/s/ Edward J. Hoort
EDWARD J. HOORT
Michigan Legal Services
900 Michigan Building
220 Bagley Avenue
Detroit, MI 48226
(313) 964-4130

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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**MEMORANDUM OPINION AND ORDER**

Before the court are plaintiffs' motions for summary judgment and class certification, and defendant's motion to dismiss. Since the facts of the case and its procedural development are important to an understanding of the court's ruling, they will be set out in some detail below.

I. FACTS

On May 11, 1981 the named plaintiffs filed suit "on behalf of themselves, their children and the class of all persons similarly situated." The class was defined as being comprised of "all persons who live in households which will have their AFDC [Aid to Families with Dependent Children] benefits terminated or reduced because of the presence of a stepparent."

The complaint challenged an amendment to Section 2 of the Michigan Poor Law, MCLA 401.2, effective January 20, 1981, and Assistance Payment (AP) Manual Bulletin 81-5 and revised AP Item 208, effective March 1, 1981. Plaintiffs challenged as violative of federal statute and constitution the new policy implemented on March 1, 1981 by the Michigan Department of Social Services (MDSS) which required that incomes of stepparents be considered in determining AFDC eligibility or grant levels for stepchildren under the age of 18 who live in the same household as the stepparent. Plaintiffs contended that the state's mandate that stepparent's income be automatically considered in computing eligibility for

and amount of AFDC benefits violated the applicable provision of the Social Security Act, 42 U.S.C. § 602(a)(7), and regulations passed under the Act. 45 C.F.R. §§ 233.90(a)(1) and 233.20(a)(3)(ii)(D).

Plaintiffs' first count asserted that the federal law required defendant to aid all "dependent children"; that in determining financial eligibility and the amount of assistance for a dependent child, defendant could only consider the net income and resources actually available to support the dependent child; that defendant could not lawfully assume the availability or resources of a stepparent when determining need or eligibility unless the stepparent was legally obligated to support the stepchild "under state law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children"; and that Michigan does not have such a law of general applicability imposing an absolute legal obligation on stepparents to support stepchildren to the same extent as is required of natural or adoptive parents.

Plaintiffs second count asserted an equal protection violation as a result of the revisions of the Michigan Poor Law, MCLA 401.2, which allegedly required stepparents to take on a greater responsibility for support of stepchildren eligible for AFDC benefits than was required of stepparents of stepchildren who were not eligible for AFDC benefits.

Count III alleged that the state policy impermissibly burdened plaintiffs' right of family privacy and free association by encouraging stepparents to move out of the home or get a divorce if they are already married, and by encouraging prospective stepparents not to get married. Plaintiffs claimed these rights were violated because the Poor Act imposed the support duty on "the stepparent of a dependent child who lives in the same household."

Plaintiffs' fourth claim alleged another violation of federal law and equal protection. Plaintiffs contended

that defendant's regular policies permitted dependent children and their caretaker relatives to deduct from gross earned income all actual expenses of producing that income; plaintiffs further asserted that the defendant permitted an earned income disregard for persons qualified to receive one. Plaintiffs contended that defendant's policy applied unequally to stepparents because it did not permit the stepparent any work expense deductions or earned income disregards. Rather, 80% of the gross earnings of a stepparent was automatically counted as available income. Plaintiffs asserted that this distinction between the incomes of stepparents and other caretaker relatives violated the Act and equal protection guarantees.

Plaintiffs sought class certification; a declaratory judgment that defendant's policies and practices violated federal statutory and constitutional provisions; injunctive relief to enjoin defendant from continuing to enforce its practice; notification to all class members of their rights to an administrative review under state procedures, and; attorney's fees.

On May 28, 1981 plaintiffs filed a motion for a preliminary injunction. The motion was filed before the predecessor judge. Plaintiffs sought to enjoin, pending trial, defendant from continuing its complained of policy regarding stepparents' incomes. The motion was argued on June 16, 1981 and granted that day in a bench opinion. On June 29, 1981 a written order was issued. In pertinent part the order granting a preliminary injunction stated:

> Plaintiffs have shown a strong or substantial likli-hood of success on the merits inasmuch as it appears that Public Act 480 of 1980, MCLA 401.2 and the Defendant's policy as found in Assistance Payments Manual Item 208, require the assumption of income from a stepparent for the purpose of calculating Aid to Families with Dependent Children (AFDC) benefits and it appears that presuming income to be

available for such purpose is violative of 42 U.S.C. § 602(a)(7) and the regulations promulgated thereunder, 45 C.F.R. 233.90(a)(1) because Public Act 480 of 1980, MCLA 401.2 is not a law of general applicability which legally obligates stepparents to support their spouse's children to the same extent that natural and adoptive parents are obligated to support their natural and adoptive children.

IT IS HEREBY ORDERED that, pending the final resolution of this case on its merits or until further order of the Court, the Defendant is preliminarily enjoined from assuming the availability of stepparent's income for the purpose of calculating AFDC benefits pursuant to Assistance Payments Manual Item 208.

IT IS FURTHER ORDERED that Defendant be and is hereby preliminarily enjoined from terminating, reducing, or denying AFDC or Medicaid benefits by reason of the assumption of the availability of stepparent's income to applicants or recipients of such benefits from and after the effective date of this order.

IT IS FINALLY ORDERED that Defendant, beginning in and for the month in which this order takes effect shall take the following actions:

(A) Reinstate all AFDC and Medicaid cases heretofore terminated because of the above enjoined policy;

(B) Raise all AFDC and Medicaid grants reduced because of the enjoined policy to their appropriate levels, and

(C) Re-evaluate the eligibility of AFDC and Medicaid applicants who were denied benefits solely by reason of the Defendant's use of Assistance Payments Manual Item 208 as modified because of the passage of 1980 PA 480.

By its own terms the order became effective June 1, 1981.

On July 1, 1981, defendant appealed the order granting a preliminary injunction to the Court of Appeals for the Sixth Circuit. Requests for stay of the order were made to both the trial and appellate courts but were denied.

On August 13, 1981 the President signed into law the Omnibus Budget Reconciliation Act of 1981, Pub.L.No. 97-35, which amended the Social Security Act, 42 U.S.C. § 602(a), effective October 1, 1981, to provide that income of stepparents living in the same household as the child shall be counted for the purposes of determining eligibility and amount of benefits for AFDC. As a result of this change in the law, the parties stipulated to amend the preliminary injunctive order, making its prospective effect valid only up to October 1, 1981. On October 21, 1981, the court entered an order amending the order granting the preliminary injunction to comport with the parties' stipulation. On October 27, 1981 the defendant's appeal was voluntarily dismissed.

The parties' motions now before the court bring to issue a concern for the narrow, discrete period of time between March 1, 1981 through June 1, 1981. March 1, 1981 was the effective date of the defendant's complained of policies. On June 1, 1981 the predecessor judge's preliminary injunction took effect, prohibiting defendant from continuing its policies. The injunction protected plaintiffs from June 1, 1981 through October 1, 1981. Both sides agree that after October 1, 1981 an amendment to the federal law upon which plaintiffs based their lawsuit ended all potential for plaintiffs' further prospective relief.

## II. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION TO DISMISS

Plaintiffs' motion for summary judgment seeks to have this court decide the same issue that was preliminarily

decided in their favor by the predecessor judge on their motion for a preliminary injunction. The legal arguments now presented by plaintiffs are substantially the same as these presented in their earlier motion. The difference is that now plaintiffs seek a declaration from this court that the past policies of defendant violated the law as it existed during March, April, and May of 1981.

The starting point for plaintiffs' motion is the then applicable section of the Social Security Act which plaintiffs assert defendant violated. Before its amendment section, 42 U.S.C. § 602(a)(7) provided:

> [T]he State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child or relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income.

Plaintiffs contend that the regulations promulgated under this section by the Department of Health and Human Services (HHS) and the cases that have interpreted this section require that before a state can deem the income of a stepparent available to the stepchild there must be a state created general, unqualified obligation on stepparents to support their stepchild to the same degree as is imposed on natural or adoptive parents.

The then applicable federal regulation upon which plaintiffs rely, 45 C.F.R. § 233.90(a)(1), provided:

> The determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, *will be made only in relation to the child's natural or adoptive parent, or in relation to the child's nat-*

*ural or adoptive parent and is legally obligated to support the child under State law or general applicability which requires stepparents to support their children.* Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State, nor may the State agency prorate or otherwise reduce the money amount for any need item included in the standard on the basis of assumed contributions from nonlegally responsible individuals living in the household.

In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.

(Emphasis added).

The amendment to the Michigan Poor Law, the basis for defendant's complained of change in policy, provided:

> The husband or wife of a poor person being of sufficient ability, shall relieve, maintain, and support the poor person, and the father and mother of a dependent child, *and the stepparent of a dependent child who lives in the same household as the dependent child,* being of sufficient ability, shall jointly or severally relieve, maintain and support the dependent child, in the manner * * * approved by the county department of social services of the county in which the poor person is settled or is living. (Em-

phasis added, reflecting amendment effective January 20, 1981).

MCLA 401.2. Based on this change in state law by the Michigan Legislature, defendant changed its policies effective March 1, 1981, as reflected in Assistance Payments (AP) Manual Bulletin 81-5 and AP Item 208.

Defendant's new policies created a uniform method of determining who was a "responsible and dependent relative" and of determining the amount of income from the "responsible relative" that would be considered as available in determining the eligibility and need. The AP Manual Bulletin stated in pertinent part:

> A major simplification is in the area of the treatment of earned income. In the responsible and dependent relative processes, 80% of the responsible and dependent realtive's gross earnings are used to establish a net income amount. The 80% process incorporates all taxes and expenses and no separate calculation of these deductions is required to net income.

The relevant provision of AP Item 208 provided:

> DEPARTMENT POLICY:
>
> A responsible relative, if financially able, is required to contribute to the support of his dependent relative who is a member of an ADC group. ADC group income may be diverted to a dependent relative of an ADC group member.
>
> A responsible relative is a person's spouse or the legal parent of an unemancipated minor child. The stepparent of an unemancipated minor child is the child's responsible relative while the stepparent and child live together.
>
> A dependent relative is a person's spouse or a person's unemancipated minor child. A person's unemancipated minor stepchild is a dependent relative when the stepparent and stepchild live together.

Plaintiffs contend that the amendment to Michigan's Poor Law did not create a legal obligation of general applicability upon stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Therefore, plaintiffs argue that defendant's change in policy violated the preamendment Social Security Act and the HHS regulations promulgated thereunder. Plaintiffs distinguish the stepparents' support obligation created by the Michigan Poor Law from the unrestricted and unconditional obligation of support Michigan places on natural or adoptive parents. As provided in MCLA 722.3:

> The parents are jointly and severally obligated to support a minor unless a court of competent jurisdiction modifies or terminates the obligation; or the minor is emancipated by operation of law except as otherwise ordered by a court of competent jurisdiction.

In MCLA 722.1 parents are defined as "natural parents, if married prior or subsequent to the minor's birth; adopting parents, if the minor has been legally adopted; or the mother, if the minor is illegitimate." Plaintiffs argue that this language differs greatly from the conditional stepparents' support obligation in the Poor Act. *See also* MCLA 722.3(2).

The plaintiffs rely upon HHS responses to other states' policies on stepparent support obligations and on case law construction of the preamended Social Security Act to support their assertion that they are entitled to the relief they seek. The court does not need to scrutinize plaintiffs' case analysis because the defendant's arguments raised in its motion to dismiss are dispositive.

Defendant's motion to dismiss argues that as a result of the amendment to the Social Security Act plaintiffs' claims are moot and the court is without jurisdiction to award any relief. Defendant contends that the change in federal law coupled with the Eleventh Amendment pro-

hibition against awarding retrospective relief against a state requires dismissal of the case against them.

Since its passage, the Eleventh Amendment has been applied by courts to hold unconsenting states immune from the suits brought in federal courts by citizens. Evolution of the rule has led courts to bar lawsuits by private parties where the liability sought to be established would lead to a pay out from the public treasury. *Edelman v. Jordan*, 415 U.S. 651 (1974).

In a narrow, circumscribed yet important modification of prior Eleventh Amendment analysis, the Supreme Court in Ex Parte Young, 209 U.S. 123 (1908), held that the Eleventh Amendment did not bar prospective injunctive relief. In subsequent cases, the Court sanctioned prospective relief even where such relief had an ancillary effect on the state treasury. *See Graham v. Richardson*, 403 U.S. 365 (1971) and *Goldberg v. Kelly*, 397 U.S. 254 (1970). However, in each instance the monetary impact upon the state was merely incidental to prospective relief.

In contrast to *Ex Parte Young* and its progeny, plaintiffs here seek to have the court award relief which is purely retrospective in nature and which is not incidental or ancillary to any prospective relief. Plaintiffs ask the court to grant them something which they are barred from recovering under the Eleventh Amendment. While plaintiffs couch their request for relief in terms of *Quern* type notice relief, the court finds that the request is not ancillary to any valid, awardable prospective relief.

The court finds that since this case involves only retrospecitve relief, it differs materially from *Quern*, the primary case urged upon the court by plaintiffs as support for their argument that defendant should be required to provide notice to a class regarding its past illegal conduct. In *Quern* the Court was called upon to answer questions left open in their remand of *Edelman v. Jordan*, 415 U.S. 651 (1974). The *Quern* Court upheld the Court of Ap-

peals for the Seventh Circuit's modification of the district court's order requiring notification to class members concerning Illinois' illegal untimely processing of disability claims. However, the critical distinction between the plaintiffs in *Edelman/Quern* and the plaintiffs here is that the *Edelman/Quern* plaintiffs had already been certified as a class and had already been successful in obtaining a permanent injunction, granting them full prospective relief. As a consequence, the notice approved of by the Court in *Quern* was viewed as ancillary to the prospective relief already granted.

In stark contrast, the present plaintiffs have not succeeded in obtaining any prospective relief at all. Plaintiffs seek to have the court make a declaratory ruling in their favor concerning past conduct, certify a class, and require defendant to send a *Quern* type notice to all class members. The court finds that plaintiffs have not obtained and could not obtain any prospective relief upon which to base an ancillary order requiring *Quern* type notice.

An examination of the well reasoned, relevant trial and appellate cases that have interpreted the impact of *Ex Parte Young* on the Eleventh Amendment and an application of the Supreme Court cases that have undertaken such an analysis dictate that before this court can award plaintiffs what they seek there must be an award of prospective relief in their favor. Because the Eleventh Amendment forecloses the plaintiffs from an award of money damages as retrospective relief and because by their own admission they are not entitled to prospective relief, the court finds it is precluded from taking the steps sought by plaintiff to impose monetary retrospective relief. *Quern v. Jordan*, 440 U.S. 332 (1979).

Accordingly, defendant's motion to dismiss is granted and plaintiffs' motion for summary judgment is denied. The Eleventh Amendment and the mootness of this case mandate the court's ruling.

In view of the court's ruling on defendant's motion to dismiss, and plaintiffs' motion for summary judgment, the plaintiffs' motion for class certification is moot and, therefore, is denied.

/s/ Charles W. Joiner
CHARLES W. JOINER
United States District Judge

Dated: June 22, 1982
Ann Arbor, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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[Title Omitted in Printing]

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**JUDGMENT**

The plaintiffs' motions for summary judgment and class certification, and defendant's motion to dismiss came on for hearing before the court, Honorable Charles W. Joiner presiding, and the issues having been duly heard and a decision having been duly rendered in a Memorandum Opinion and Order dated June 22, 1982.

It is Ordered and Adjudged that the plaintiffs take nothing, and that the action be dismissed on the merits, with prejudice.

ROBERT A. MOSSING

/s/ Sharon M. Burley
Clerk of Court

/s/ Charles W. Joiner

Dated: June 22, 1982
Ann Arbor, Michigan

## II. THE CHILD CARE CASE— MWRO v. DEMPSEY

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

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Civil No. 80-60017

MICHIGAN WELFARE RIGHTS ORGANIZATION

*v.*

JOHN T. DEMPSEY

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### RELEVANT DOCKET ENTRIES

| Date | Proceedings |
|---|---|
| 1980 | |
| Apr. 11 | Complaint filed, summons issued. |
| May 6. | Plfts' motion for class certification, with brief. |
| May 9. | Plft's notice of hearing on 6-3-80 at 2:00 p.m. |
| May 12. | Order, re: the motion (#3) filed in the above-entitled cause will be denied unless the movant files, within 5 days of the date of this order, a proof of service as required by local court rule IX(i) & a notice of hearing as required by local court rule IX(j), with pfoor of service. DeMascio, J. |
| May 28. | Deft's brief in opposition to motion for class certification, with attachment & proof of service. |
| June 3. | Deft's answer, with affirmative defenses, proof of service & exhibits. |

| Date | Proceedings |
|---|---|
| June 4. | Plfts' supplemental brief in support of class certification. |
| (out of order) | |
| June 3. | Plft's motion for class certification heard & taken under advisement. |
| July 22 | Supplemental affidavit of John T. Dempsey with attachment |
| July 25. | Plfts' 2nd supplemental brief in support of motion for class certification, with proof of service. |
| Sept 8. | Deft's supplemental brief in opposition to motion for class certification, with attachments & proof of service. |
| 1981 | |
| Jan 23. | Memorandum & order, re: that Plfts' motion for class certification be & the same is hereby denied. DeMascio, J |
| Jan 9. | Plfts' first set of interrogatories & request to admit, with exhibits & proof of service. |
| Jan 27 | Notice of pretrial conference set for 2/25/81 @ 4:30. |
| Feb 3. | Deft's motion to dismiss, with brief & proof of service. |
| Feb 13. | John Green's motion to intervene, with exhibits, brief, proof of service & proposed intervenor complaint for declaratory injunction & other releif. |
| | Deft's response to plfts' request to admit, with proof of service. |
| Mar 4. | Plft's response, with affidavit, & brief. |
| Mar 10 | Brief in opposition to motion to intervene with attachments |
| Mar 26. | Plfts' points & authorities in response to deft's brief in opposition to intervention. |

| Date | Proceedings |
|---|---|
| Mar 30. | Deft's motion to dismiss, denied & motion to intervene as pltf is granted. |
| Apr 10. | Order granting intervention, re: of Johnny Green. DeMascio, J |
| Apr 15. | Order denying dismissal, re: counts I & III of plfts' complaint are dismissed as to Gail Blessing only, as they are moot. & as to all other respects, defts' motion to dismiss is denied. DeMascio, J |
| Apr 24. | Plft's request for production of documents, |
| May 6 | Defendant Dempsey response to request for production of documents |
| 1982 | |
| Jan 7 | NOTICE of trial for Feb. 1/82 at 9am. |
| Jan 29 | ORDER OF REASSIGNMENT TO ANN ARBOR. DD 1/4/82. Feikens, J. |
| Feb 9 | Plfts motion for summary judgment w/brief & attachments. |
| | Deft. Dempsey's Motion to Dismiss, BA with Ex. A-H, PS (no notice of hearing) |
| Feb 4 | Deft's Answers to Pltfs' First Set of Interrs. and PS |
| Feb 9 | Pltfs' MOTION for Class Action, BA. No Notice of Hearing. |
| | Pltfs' Brief in Opposition to MOTION to Dismiss, with attachments. |
| Feb 1 | Deft's Brief in Opposition to Plts' MOTION for Summary Judgment, with PS. |
| Feb 17 | NOTICE of hearing on Pltf's Motion for Class Certification and Motion for SJ set for 3/9/82 at 2:30 PM and PS |
| Feb 17 | John T. Dempsey's ANSWER to Intervenor Complaint and PS |

| Date | Proceedings |
|---|---|
| Feb 19 | John T. Dempsey's AMENDED NOTICE of hearing on Motion to Dismiss previously set for 2/16/82 reset for 3/9/82 at 2:30 PM and Proof of Service |
| Mar. 8 | Pltfs'. Supplemental Memorandum in Opposition to MOTION to Dismiss & in Support of MOTION for Summary Judgment, with attachments. |
| Mar. 8 | Trial set for today adj. to 3/15/82 by court. |
| Mar. 9 | MOTION to Certify Class & Cross MOTIONS SJ hrd/ TAKEN UNDER ADVISEMENT. |
| Mar. 16 | Pltfs' Supplemental Memo in Opposition to Dismissal & in Support of SJ, & PS. |
| | Entered in error (See 79-60017 # 62.) |
| Apr. 19 | Pltfs' Attachments to pltfs' Briefs in support of their MOTION for SJ and MOTION for Class Certification. |
| Jun 23. | MEMORANDUM Opinion and order Denying Pltf's Motion for summary Judgment and Granting Deft's Motion to dismiss Joiner, Motion for Class Certification is Moot. |
| Jun 23. | JUDGMENT that pltfs take nothing and that the action be dismissed prejudice. |
| July 22 | Pltfs' Notice of Appeal from final judgment entered on 6/22/82. DD 7/23/82 |

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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Case No. 80-71479

MICHIGAN WELFARE RIGHTS ORGANIZATION, on behalf of its members, and GAIL BLESSING, individually, and both plaintiffs on behalf of all others similarly situated,
PLAINTIFFS

*vs.*

JOHN T. DEMPSEY, individually and in his official capacity as Director, Michigan Department of Social Services,
DEFENDANT

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**COMPLAINT FOR DECLARATORY INJUNCTIVE AND OTHER RELIEF**

## I.

## PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief to redress the Defendant's failure to administer Michigan's Aid to Families with Dependent Children Program (ADC or AFDC) consistently with the applicable federal statutes and regulations and the Fourteenth Amendment to the United States Constitution. More specifically, Plaintiffs allege that the Defendant has failed to allow ADC applicants and recipients to deduct actual costs of child care and other actual expenses of employment from their earned income in determining grant eligibility as required by § 402(a)(7) of the Social Security Act and regulations under the Act, and has failed to give said applicants and recipients adequate notice of

their rights and remedies as required by the federal regulations and the Due Process clause of the Fourteenth Amendment to the United States Constitution. Plaintiffs further allege that the Defendant's failure to allow child care costs to be deducted while allowing other actual expenses of employment to be deducted drawn directly among recipients without any rational basis in violation of the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

2. Plaintiffs bring this suit to request injunctive and declaratory relief on behalf of themselves and all persons throughout the State of Michigan who are, have been, or will in the future be adversely affected by the Defendant's policies and practices.

## II.

## JURISDICTION

3. Plaintiffs' action for declaratory, injunctive and relief are authorized by:

(a) 28 USC §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure, which relate to declaratory judgments;

(b) 42 USC § 1983, which provides for redress of any deprivation, under color of state law, of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and laws of the United States.

4. Jurisdiction is conferred upon this Court by 28 USC § 1343(3), the pendent jurisdiction doctrine and 28 USC § 1331. The amount in controversy, exclusive of interest and costs exceeds $10,000.00.

## III.

## CLASS ACTION

5. The individual named Plaintiffs bring this action on their own behalf and, pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all other persons similarly situated. The members of the class similarly situated to the named Plaintiffs are all applicants for and recipients of ADC in Michigan, who have unsuccessfully claimed or will claim, or who have not been or will not be adequately informed of their right to claim, excess child care costs and other reasonable actual expenses incurred in connection with their employment, and who consequently have had their eligibility or level of benefits determined without regard to such actual expenses of employment.

6. The requirements of Rule 23 are met in that: the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of all class members; the claims of the representative parties will fairly and adequately protect the interests of the class; and the party opposing the class has acted on grounds generally applicable to the class, i.e., failing to consider all reasonable costs as actual expenses of employment, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

## IV.

## PLAINTIFFS

7. The individual named Plaintiff is a current recipient of benefits under the ADC Program, who has requested that the cost of child care necessitated by her employment be deducted from her earned income as an "actual expense of employment" in the determination of the amount of her ADC grant and whose request has been denied.

8. The Michigan Welfare Rights Organization, located at 2701 W. Chicago Blvd. in Detroit, Michigan, Wayne County, is a state-wide unincorporated association of Michigan recipients of public assistance, a majority of whose members receive ADC assistance and Food Stamps, and was formed to enable them to learn of their rights and entitlements, to provide concrete help and assistance to its members and to other recipients throughout the State on individual or common problems, to educate the public and those officials directly affecting or implementing welfare policy of the problems of welfare recipients, and to take action through various means including litigation to improve social welfare programs and to protect the rights of its members and all other poor persons seeking or obtaining benefits under those programs.

9. Some individual members of the Michigan Welfare Rights Organization and some other recipients of ADC have contested Defendant's denial of the deduction of child care costs and other expenses as actual expenses of employment and have received favorable results from administrative hearing decisions. Other recipients and applicants have been told that they may not deduct child care costs and, as a consequence, have not contested Defendant's denial of such deductions.

10. On behalf of members of the class, attorneys at Legal Services of Southeastern Michigan, have requested Defendant Dempsey and his agents to comply with federal requirements regarding the deduction of all reasonable work-related expenses, but have been unable to gain any voluntary compliance with the said regulations.

## V.

## DEFENDANT

11. The Defendant John T. Dempsey is the Director of the Michigan Department of Social Services (the "single state agency" for Michigan under Title IV of the Social Security Act) and is responsible for development of de-

partmental policy regarding the ADC program, implementation of rules and regulations of the Department for administering the said program in accordance with the applicable rules and regulations of the Federal government under MCLA 400.10, and 42 USC § 602.

## VI.

## FACTUAL ALLEGATIONS

12. Defendant Dempsey must comply with the Social Security Act and applicable federal regulations thereunder promulgated by the Department of Health, Education and Welfare (HEW) in order for the Michigan Department of Social Services (the Department) to continue to receive matching federal funds.

13. The Social Security Act, in 42 USC § 602(a)(7) requires that the State Department consider "any expenses reasonably attributable to the earning" of income in determining eligibility for AFDC.

14. Regulations promulgated by HEW in 45 CFR §§ 233.20(a)(6)(iv) and (7)(i) require that "all work expenses" be deducted from earned income in determining need.

15. Regulations promulgated by HEW in 45 CFR § 206.10(a)(2)(i) and (4) require that adequate notice of an applicants' rights be given and 45 CFR § 205.10(a) requires that whenever action is taken on an ADC case, notice of hearing rights must be given.

16. The Defendant has promulgated and is responsible for enforcing certain state regulations regarding the determination of need pursuant to MCLA 400.9; MSA 16.409. Such regulations provide a standard work expense deduction of $40.00 per month for working applicants or recipients of ADC. Such regulations provide, further, in Assistance Payments Manual, Item 331, page 3, that "actual expenses [of employment] may be allowed as deductions in determining the net budgetable earned income" if those expenses are specifically attributable to

earning the income, such expenses are itemized on the family's current Budget Sheet, the amounts can be verified by receipts and are reported monthly, and the amounts are for an appropriate and reasonable dollar amount for such an expense. Such regulations further provide that "[s]ince day care is provided to recipients without cost . . . it is not considered an expense of employment for applicants or recipients."

17. The sentence in Item 331, page 3, regarding the provision of day care without cost by the Department refers to a program, implemented as part of Michigan's plan for social services under Title XX of the Social Security Act, 42 USC § 1397, set forth in Services Manual, Item A-416, page 2a that all employed recipients of ADC qualify for Department payment of the full cost of child care up to maximums set by the Department. These maximums, in Services Manual Item A-446, p. 3, are: $4.16 for a full day and $2.08 for a half-day of in-home care; ($.51 per hour); $5.24 for a full day and $3.24 for a half day in a certified day care home ($.66 and $.65 per hour respectively); and $7.88 for a full day and $4.88 for a half-day in a licensed day care center ($.99 and $.98 per hour).

18. Many working applicants for and recipients of ADC are unable to obtain child care at a cost within the maximums set by the Department.

19. Many applicants for and recipients of ADC have not been informed that they can deduct excess child care costs as an actual expense of employment or have requested, but have been denied such deduction, and have not been informed of their right to a hearing on that matter.

(a) *NAMED PLAINTIFF*

As to Gail Blessing, Plaintiffs allege the following:

20. She resides in a small town in Washtenaw County, Michigan and is a citizen of the United States and a resident of the judicial district.

21. At all times pertinent hereto, she is and was a recipient of ADC (case number K81158818A) through the Washtenaw County Department of Social Services on behalf of herself and her two children because of the continued absence from the home of the children's father.

22. On August 13, 1979, Ms. Blessing began working in nearby Ann Arbor, Michigan being paid at a rate of $4.00 per hour for approximately 40 hours per week. She has continued to work up to the present time.

23. Ms. Blessing's employer's place of business in Ann Arbor is 14.3 miles from Ms. Blessing's home and she must drive her car 28.6 miles each day round trip, to get to work and back home because convenient public transportation is not available.

24. Because of her job, Ms. Blessing has had to make arrangements for care of her children while she is at work. Approximately 55 hours of day care is necessary for her children each week.

25. The maximum rate which the Defendant will pay for licensed day care for both children is $8.48 per day. Though she has tried, Ms. Blessing has been unable to find suitable day care at a cost within this limit. The cheapest suitable day care arrangement which she has been able to procure costs $1.00 per child per hour for an average cost of $11.50 per day. This means that Ms. Blessing must pay approximately $15.10 per week for day care above the $42.40 provided by the Department.

26. When she began work, Ms. Blessing became obligated to fill out and return certain of the Department's monthly reporting forms providing detailed information relevant to her earned income, including information regarding work expenses. Because she was not told by any Department employee that she could claim child care costs or mileage as work-related expenses, or how to do so, and because the Monthly Income Report form stated that she would have to attach receipts for all expenses claimed, Ms. Blessing did not claim actual work expenses for her first months of employment. She was, therefore,

credited with only the standard $40 per month work expense deduction by the Department.

27. In February, 1980, Ms. Blessing went to the office of Legal Services of Southeastern Michigan about her divorce and, in the process of discussing her family's situation with a paralegal worker in that office, was told that she should claim mileage, day care costs and any other actual expenses which she had incurred as a result of her job.

28. When Ms. Blessing called her caseworker to inquire about actual expenses deductions, she was told that mileage would be allowed at 18.5 cents per mile, but that day care charges which she had been paying could not be allowed as deductions. She was not informed by her caseworker that she could request a hearing if she was dissatisfied with the determination.

29. She nonetheless filled out her earned income reporting form on February 1, 1980 claiming the day care expenses as well as the cost of gasoline for her car and $218.45 for repairs to the car made necessary when it broke down on the way to work one day. A copy of the said form is filled out by Ms. Blessing is attached as Plaintiff's Exhibit A and by this reference incorporated herein. Ms. Blessing has continued to claim and be denied actual expenses of child care each month since February 1, 1980.

30. On March 3, 1980, Ms. Blessing filed a hearing request contesting the Department's failures to inform her as to what work expenses would be allowed and requesting that she be allowed deductions for commuting, car repairs and insurance, and day care charges in excess of the amount paid by the Department. A copy of her hearing request is attached as Plaintiff's Exhibit B and by this reference incorporated herein.

31. At a pre-hearing conference held on March 17, 1980 with her caseworker and the Intake Supervisor, Ms. Blessing was told that, as a result of her earned income report of February 1, 1980, the Department had allowed

her to deduct the car repair costs of $218.45, but it had later determined that deduction to be improper. She was also told that her claim for commuting expenses would be allowed for 28.6 miles per day at the flat rate of 18.5 cents per mile. However, she was informed that her claim for day care expenses in excess of the amount paid by the Department would not be allowed because of the prohibition against allowing any day care expense deductions set forth in Item 331, page 3, of the Assistance Payments Manual. A copy of the Hearing Summary setting forth the Department's position is attached as Plaintiffs' Exhibit C and by this reference incorporated herein.

(b) *ORGANIZATIONAL PLAINTIFF*

32. Michigan Welfare Rights Organization has received numerous complaints from its members and others regarding the Defendant's refusal to deduct actual child care costs as an expense of employment.

33. A number of other applicants for and recipients of ADC have complained of the Department's failure to allow excess child care costs as deductions from earned income. On their behalf, attorneys from the office of Legal Services of Southeastern Michigan initiated a correspondence with Defendant and with Paul E. Webb, Regional Commissioner of the Department of Health, Education and Welfare, requesting that Item 331 of the AP Manual be changed. Mr. Webb, in a letter dated May 9, 1978, advised Defendant Dempsey that "if the amount [of child care allowance] under your service plan does not meet the actual cost of child care, it will be necessary to revise your Title IV-A plan to assure that all actual reasonable expenses of employment are considered." A copy of that letter is attached as Plaintiffs' Exhibit D and by this reference incorporated herein. A subsequent letter from Mr. Webb, dated October 10, 1978, again refers to the illegality of the prohibition

on deducting child care expenses in Item 331 stating: "If AFDC applicants and recipients are being required to pay excess child care costs, please advise us what corrective actions you intend to take to obtain compliance with Section 402(a)(7) of the Social Security Act". A copy of that letter is attached as Plaintiff's Exhibit E and by this reference incorporated herein. Despite being apprised of the Item's illegality, Defendant has failed to change the policy and has offered no reasonable explanation for failing to doing so. As a consequence a great number of applicants and recipients are daily being denied the benefits which Congress has clearly intended that they be provided.

34. A number of applicants and recipients who have inquired regarding deductions have been told that, under Item 331, page 3, they cannot claim excess child care costs and other expenses as expenses of employment and have not been adequately informed of their right to a hearing on the matter. A few have requested a hearing anyway and have been awarded the deduction despite the prohibition in Item 331. Others have read the notice in their monthly income reporting form that they must attach receipts for all work expenses as precluding any claim for expenses such as mileage.

35. Plaintiff Michigan Welfare Rights Organization believes and therefore alleges that many ADC recipients and applicants, including its own members, have suffered and will continue to suffer in the future as a result of Defendant's failures to comply with 42 USC § 602(a)(7), 45 CFR §§ 233.20(a)(6)(iv) and (7)(i) and 45 CFR §§ 206.10(a)(2)(i) and (4).

## VII.

## FIRST CLAIM FOR RELIEF

36. The failures of the Defendant Dempsey, as set forth above, to allow Plaintiffs and their class to claim actual costs of child care and other expenses of employ-

ment when they exceed the standard $40 per month work expense allowance violates the requirements of § 402(a)(7) of the Social Security Act, 42 USC §602(a)(7), and the regulations thereunder, 45 CFR §§ 233.20(a)(6)(iv) and (a)(7)(i) and therefore contravene the Supremacy Clause of the United States Constitution.

## VIII.

## SECOND CLAIM FOR RELIEF

37. The failures of the Defendant Dempsey, as set forth above, to require that applicants for and recipients of ADC be clearly informed of their right to claim actual work expenses which exceed the standard amount, including child care costs in excess of the Department of Social Services subsidy and mileage, and of their right to request an administrative hearing to contest Defendant's employees' refusals and failures to include as work expense deductions all actual expenses incurred in connection with employment, including child care costs in excess of the subsidy provided and mileage, violate the rights of Plaintiffs and their class under 45 CFR § 206.10(a)(2)(i) and (a)(4), 45 CFR § 205.10(a)(3), and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

## IX.

## THIRD CLAIM FOR RELIEF

38. The Defendant, by promulgating and carrying out the provisions of AP Manual Item 331, allows some actual work expenses to be deducted, but disallows child care expenses in excess of the maximum subsidy paid by the Department. In light of the purposes of the ADC program, no rational basis exists for allowing some actual expenses of employment but not allowing others. Consequently, the distinction drawn in Item 331 violates

the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

## X.

## EQUITY

39. Plaintiffs and the class they represent, have no plain adequate or complete remedy at law to redress the above stated deprivations of their federal and state constitutional, statutory, and regulatory rights, and are suffering and will continue to suffer irreparable harm therefrom unless relief sought herein is granted by this Court.

## RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, pray that this Court:

(a) Assume jurisdiction of this cause pursuant to 28 USC §§ 1343 and 1331;

(b) Determine by order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action may be maintained as a class action;

(c) Enter a final judgment, declaring that the Defendant Dempsey's action in denying full deduction of all actual expenses, including child care costs, as expenses of employment, violates the Social Security Act, 42 USC § 601 *et seq.*, the regulations thereunder; and the Equal Protection Clause;

(d) Enter a final judgment declaring that the Defendant's action in failing to give adequate notice of recipients an applicants rights with respect to the deduction of actual employment-related expenses and of their rights to a hearing, violates the Social Security Act, 42 USC § 601 *et seq.*, the regulations thereunder, and the Due Process clause;

(e) Enter preliminary and permanent Injunctions enjoining the Defendant, his officers, agents, employees and persons in active concert or participation with him from

denying all reasonable expenses, including excess child care costs, as actual expenses of employment, and from failing to inform applicants and recipients of their rights to deduct such expenses and to obtain an administrative hearing.

(f) Allow Plaintiffs their costs herein plus reasonable attorneys fees, and grant them and all persons similarly situated such additional or alternative relief as may seem to this Court to be just and equitable.

DATED: April 11, 1980

/s/ William Burnham
WILLIAM BURNHAM
Attorney for Plaintiff
Ann Arbor, MI 48104

/s/ Edward Hoort
EDWARD HOORT
Attorney for Plaintiff
Detroit, MI 48226

JAN 1-31 1980

# MONTHLY INCOME REPORT

FEB -4 1980

Michigan Department of Social Services

| | | | |
|---|---|---|---|
| K 911585 81 | ADC Eligibility No. 3 2 | Co. Co. 81 | ADC Worker's Name DOLLAR HIDE |

Client's Name: GAIL BLESSING

Address (Number and Street): 94 W. MAIN

City, State, ZIP Code: MILAN, MI. 48160

County Return Address: WASH. CO.

**INSTRUCTIONS:** This income report is needed to determine your grant amount. Fill in this form completely on the last day of the month shown above. Sign and mail to your County Department of Social Services Office in the enclosed stamped envelope. If you do not report your income to the County Department of Social Services Office by the 5th (FIFTH) of the month after the month shown above, we will be unable to determine your eligibility for assistance, and your payments may stop. Be sure to answer each question and sign the form.

**INCOME TO REPORT:** If you earned, received or stopped receiving income or had a change in other income during the report month, list all income and report below. Income includes EARNINGS (salary, wages, tips, commissions and bonuses); free housing or utilities; UNEMPLOYMENT INSURANCE/DISABILITY INSURANCE, workmens compensation, strike benefits, training allowances or incentive payments; SOCIAL SECURITY/RAILROAD RETIREMENT, supplemental security income (SSI), pensions, business, farm, rental; CHILD SUPPORT, or other contributions paid directly to a family member; MILITARY BENEFITS, settlements, tax refunds, and any other money you receive. DO NOT REPORT YOUR ADC, MEDICAL ASSISTANCE, GENERAL ASSISTANCE, OR FOOD STAMP BENEFITS.

| WHO RECEIVED INCOME, MONEY, OR BENEFITS | SOURCE OF INCOME, MONEY, OR BENEFITS (If earnings, list employer and employer's address) | HOURS WORKED | DATE(S) RECEIVED | GROSS AMOUNT (Before deductions) |
|---|---|---|---|---|
| Gail Blessing | ✓ Emmet Corp 2501 S. Industrial Av Ann Arbor | 80.25 | ✓ 1-11-80 | ✓ 320.80 |
| " " | " " | 87.50 | 1-25-80 | 352.40 |
| | | | | |

YOU MUST SEND ALL PAY STUBS FOR EARNED INCOME OR VERIFICATION OF CHANGES IN OTHER INCOME WITH THIS FORM. IF YOU DO NOT KNOW WHAT VERIFICATION YOU MUST SEND, CONTACT YOUR ADC WORKER.

**WORK EXPENSES:** Complete for earned income only.

If you had earned income from employment (whether as an employee or from self-employment) you are entitled to a $40 deduction for your normal work related expenses each month. When your expenses are greater than $40 you may choose to claim the actual expenses by listing your work related expenses below. If actual expenses are claimed, YOU MUST ATTACH RECEIPTS.

IF YOU WISH TO CLAIM ACTUAL EXPENSES, complete the report below:

| Person Claiming Expenses | Days Worked | Hours Worked | TRANSPORTATION EXPENSES (Actual receipts) Method Used (car, bus, etc.) | Days using this method | Daily cost round trip | Daily miles round trip | OTHER WORK EXPENSES — Required work uniforms, or tools, licenses, membership, insurance or union dues, etc. (Attach receipts) Items | Amount |
|---|---|---|---|---|---|---|---|---|
| Gail | 21 | 117.70 | Car | 21 | .28 | 21 4/10 | Baby sitting expenses (See receipts) | 93.28 |
| | | | | | | | Car repairs (See receipts) | 218.74 |
| | | | | | | | | |

**INCOME FROM SELF-EMPLOYMENT:** If you were self-employed, attach a separate sheet of paper, if needed, listing and explaining gross operating expenses. (Attach receipts for business expenses claimed.)

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING STATEMENTS ARE TRUE AND CORRECT.

Client's Signature: Gail Blessing Date Signed: FEB 1, 80

DSS-[illegible] (Rev. 7-79) (This form is designed to work with County Computer DSS-[illegible] and DSS-[illegible])

Plaintiff's Exhibit A
Page 1 of 1
(Receipts attached by plaintiff omitted)

BEST AVAILA

**REQUEST FOR HEARING**
**Michigan Department of Social Services**

INSTRUCTION: Complete all items below. (Please type or print.) Send completed form in envelope provided or, mail to:

Department of Social Services
Bureau of Administrative Hearings
P.O. Box 30041
Lansing, Michigan 48909

Case Name: Gail Blessing
Case Number: X0115018 A
Date: 3/3/80
County: | District: | Unit: 3 | Manual: 02 | Other ID (If Required):
Recipient:
Name Completing DSC-1A Received From (If Other):

This request for hearing concerns the follow (check one or more):

- [x] ADC Grant
- [ ] Medical Assistance
- [ ] Food Stamps
- [ ] Services
- [ ] Level of Nursing Care
- [ ] Licensing
- [ ] Social Assistance
- [ ] Other

I request an administrative hearing before an Administrative Law Judge regarding the decision of Washtenaw County (Name of County or State Office) Department of Social Services. Following are my reasons for requesting a hearing.

I have had work expenses in excess of the standard deduction, yet I have not been allowed to claim them. I was never told that I could claim actual work expenses instead of the standard deduction used to compute my grant. I have been employed since August 13, 1979. I drive 28.6 miles to and from work each day. My auto insurance costs $76 for six months. I had to pay $219.4[illegible] in January, 1980 to have my car repaired in order to have transportation to work. Since October 15, 1979 I have had to pay $15 per week for day care, in addition to the amount of Department of Social Services pays.

I am requesting ongoing ADC benefits and retrospective ADC benefits based on my income minus my actual work expenses for day care, mileage, auto insurance and car repair.

IMPORTANT: PLEASE ENCLOSE NOTICE YOU MAY HAVE RECEIVED WHICH CAUSED YOU TO REQUEST A HEARING.

Signature of Person Requesting Hearing: Gail Blessing
Telephone Number: 439-2073
Date: 3/3/80
Street Address or Route Number: 94 West Main Street
City, State, and Zip Code: Milan, MI 48160

TO BE COMPLETED ONLY IF AN ATTORNEY HAS AGREED TO REPRESENT YOU AT THE HEARING

Name of Attorney: William Burnham
Firm or Agency: University of Michigan
Telephone Number: (313) 665-2777
Street Address or Route Number: 420 North Fourth Avenue
City, State, and Zip Code: Clinical Law Program Ann Arbor, MI 48104

DSC-1A (Rev. 3-79) Previous editions obsolete.

Administrative Hearings

Plaintiff's Exhibit B
Page 1 of 1

BLE COPY

**HEARING SUMMARY**
Michigan Department of Social Services
BUREAU OF ADMINISTRATIVE HEARINGS

| | | | | |
|---|---|---|---|---|
| Case Name: WILLIAMS, GAIL | | | | |
| Case Number: RB1150184 | | | | Date: 3/27/80 |
| Hearing: #1 | Rehearing: #2 | Date: 03 | Time: 02 | Other (for DHS requests) |

(1) Date hearing requested: 3/3/80
(2) Effective date of action:
Budget remains as is

(3) Date client notified of Department action:
(4) Delayed pending hearing? ☐ Yes ☒ No - no negative action to delete

☐ Financial Assistance (ADC, MA, FS, GA) or Social Services Action:
1. Does claimant attend case conference: 3/14/80 ☐ Accepted ☐ Rejected
2. Date of hearing review:
3. Action(s) prompting hearing request:
☐ Termination ☐ Denial of Application ☒ Reduction ☐ Suspension ☐ Other:
4. Monthly cost: Before negative action: After negative action:

☐ Licensing Action(s):
☐ Denial ☐ Refusal to renew ☐ Revocation ☐ Modification ☐ Other:

Explanation of action taken and facts and fact sources used in taking action:

A projected budget was completed in October 1979 effective November 1979 since client reported starting work in September 1979. DHS-2C's were mailed to the client and she returned her first one dated 10/31/79. A budget was completed using the standard $40.00 deduction since no additional expenses were claimed. The DHS-2C states "when your expenses are greater that $40.00 you may choose to claim actual expenses....if actual expenses are claimed you must attach receipts." A subsequent budget was done in December using $40.00 since client did not report actual expenses either on the DHS-2C or by attaching receipts. The same action was taken when she reported her December income in January. In February when she reported her January income she declared actual expenses in excess of $200.00 which included $93.28 for babysitting and $218.74 for car repairs. Per AP Item 331, p. 3 effective 3/1/79, daycare expenses cannot be used. However, we did deduct $218.74 as an expense of employment for car repairs, which included towing, labor $106.00, and parts costing $49.50, even though the manual does not specify that this is a deduction (i.e. maintenance of an automobile) and this was an administrative error. If we had budgeted her mileage as an expense 25.6 miles per day x 21 days = 600.6 miles x 18.5/a = 111.11. She was given $107.63 more than she would normally have received. In regards to her car insurance, no verification of cost has been sent in and we feel that the cost of insurance is not necessarily work related, since she would have to pay this even if she were not working.

Law and Regulation(s) or manual item(s) used in taking action:
GA — AP Manual Item 331

Prepared by: Mary Dotter, AP Worker — Washtenaw County DHS — Date: March 17, 1980

Attach copies of papers to be used at the hearing, including medical information where in issue. If licensing action, please attach copy of licensing study report. Submit Hearing Summary in duplicate WITHIN 5 DAYS OF the hearing review to: Department of Social Services, Bureau of Administrative Hearings, P.O. Box 30041, Lansing, Michigan 48909.

DHS-[illegible] (Rev. 7-79) Previous edition may be used. DISTRIBUTION: [illegible]

Plaintiff's Exhibit C
Page 1 of 1

BEST AVAILABLE COPY

PLAINTIFF'S EXHIBIT D

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

REGION V

300 South Wagner Drive
Chicago, Illinois 60000

May 9, 1978

Social Security Administration

Dr. John T. Dempsey, Director
Michigan Dept. of Social Services
Commerce Center Building
300 S. Capitol Avenue
Lansing, Michigan 48926

Dear Dr. Dempsey:

Enclosed is a copy of a letter dated April 18, 1978 from Michael Leonard, Staff Attorney, Washtenaw County Legal Aid Society, Inc. Mr. Leonard has raised question about the Michigan policy on child care allowances and employment expense deductions.

Your Title IV-A plan on employment expenses (Attachment 2.3-F, Page 2) indicates that the cost of child care is met by "Service provided or purchased by agency." We do not have a copy of the Service Manual item which establishes the amount of child care allowance paid by your agency. However, if the amount allowed under your service plan does not meet the actual cost of child care, it will be necessary to revise your Title IV-A plan to assure that all actual reasonable expenses of employment are considered.

The Supreme Court decision in Shea v. Vialpando interpreted Section 402(a)(7) of the Social Security Act as

a congressional directive that no limitation, apart from that of recommendations, may be placed upon recognition of work-related expenses, and hence a fixed work-expense allowance that does not permit deductions for expenses exceeding that standard directly contravenes the language of the statute."

Under the Supreme Court decision, a State Agency may set a standard amount for work related expenses as long as the agency also provides for all actual reasonable expenses that exceed the standard. A State Agency may not have maxima on expenses reasonably attributable to the earning of income.

Will you please send us a copy of the Service Manual item which establishes the amount of child care allowances provided by your agency. We also need to know the status of any actions you are taking to revise policy on employment expense deductions for child care.

We will appreciate receiving a response on this matter by June 8, 1978.

Sincerely,

/s/ Paul E. Webb
PAUL E. WEBB
Regional Commissioner

cc: Mr. William Dailey, Acting Director
Office of Income Assistance, MOSS

Enclosure

PLAINTIFF'S EXHIBIT E

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

---

October 10 1978

Dr. John T. Dempsey, Director
Michigan Department of Social Services
Commerce Center Building
300 S. Capitol Avenue
Lansing, Michigan 48926

Dear Dr. Dempsey:

Thank you for your letter of June 26, 1978, regarding alternative funding sources for child care which you are considering. It was our understanding from Ms. Kale's discussion with Mr. Townsend on August 8, 1978, that a bulletin was to be issued giving revised policy on child care as an expense of employment.

We have not received a copy of a bulletin on child care allowances. However, in reviewing the instructions contained in Manual Item 331, page 3 (revised 8/15/78 effective 9/1/78), we noted a statement on "Day Care as an Expense" which reads as follows: "Since day care is provided to recipients without cost and to non-recipients either without cost or at partial cost based on income, it is not considered an expense of employment for applicants or recipients."

We are unable to determine the exact meaning of this policy statement as it affects applicants for and recipients of AFDC. Has policy been revised to provide full cost (as a service payment) of child care for recipients of AFDC? What consideration is given to AFDC applicants who have child care costs in excess of the amounts provided under your Title XX Services Program?

In the Services Manual material sent with your letter of June 26, Title I lists the "In-Home Unit Rate Schedule" and Table II, the "Maximum Out-of-Home Care Rates." However, we noted Mr. Leonard's statement in his letter of April 18, 1978, that "many of our working ADC clients . . . pay perhaps $40.00 or $50.00 per week for day care for their child while the department presumes day care is available for $23.40 per week." Are clients required to pay amounts for child care in excess of the Department Standards as listed in the Services Manual?

We will appreciate receiving clarification of your present policies as contained in the Assistance Payments and the Services Manual with regard to child care payments for AFDC applicants and recipients. If AFDC applicants and recipients are being required to pay excess child care costs, please advise us what corrective actions you intend to take to obtain compliance with Section 602(a)(7) of the Social Security Act. We would appreciate your reply by October 27, 1978, if at all possible.

Sincerely,

PAUL E. WEBB
Regional Commissioner

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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No. 80-71479

Hon. Robert E. DeMascio

[Title Omitted in Printing]

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**ANSWER**

NOW COMES Defendant John T. Dempsey, by and through Frank J. Kelley, Attorney General of the State of Michigan and the undersigned assistant attorneys general, and answering Plaintiffs' Complaint for Declaratory Injunctive and other Relief says as follows:

1. Defendant is not required to respond to Plaintiffs' legal conclusions and statements of intent contained in the preliminary statement, however, to the extent any facts are stated therein they are denied.

2. Defendant is not required to respond to Plaintiffs' statement of intent relative to the scope of this lawsuit.

3(a). Defendant denies that an actual controversy exists which gives rise to a cause of action for declaratory relief under 28 U.S.C. 2201 and 2202 or Fed.R.Civ.P. Rule 57.

3(b). Defendant denies that this action is authorized by 42 U.S.C. 1983 as Plaintiffs sole non-frivolous claim is for alleged violation of the Social Security Act, not violation of civil rights cognizable under 1983.

4. Defendant denies that this Court's jurisdiction has been properly invoked under 28 U.S.C. 1343(3), pendent jurisdiction and 28 U.S.C. 1331. Defendant further denies that each Plaintiff or alleged class member has more

than $10,000 in controversy, exclusive of interest and costs.

5. Defendant denies that Plaintiffs are entitled to bring this action either on their own behalf or as a class action and in support of said denial reasserts as though set out herein the reasons included in Defendant's Brief in Opposition to Motion for Class Certification filed May 23, 1980.

6. Defendant denies that the requirements of Rule 23 have been met and in support of said denial reasserts herein the statements contained in Defendant's Brief in Opposition to Motion for Class Certification filed May 23, 1980.

7. Defendant admits the allegations contained in paragraph 7. However, although the local department office initially denied her request it was subsequently granted, after an administrative hearing.

8. Defendant lacks knowledge or information sufficient fo form a belief as to the truth or falsity of the allegations contained in said paragraph and leave Plaintiffs to their proofs.

9. Defendant admits that some individual members of Plaintiff Michigan Welfare Rights Organization (hereinafter MWRO) may be members of the alleged class however none are named Plaintiffs herein.

10. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in said paragraph and leave Plaintiffs to their proofs.

11. Defendant admits the allegations contained in paragraph 11.

12. Defendant admits the allegations contained in paragraph 12, to the extent the provision of the Social Security Act and regulation is mandatory in nature and does not leave any discretion to the State. Further answering said paragraph, this Defendant affirmatively states that:

MCLA 400.10 designates the Michigan Department of Social Services as the state agency to cooperate with the

federal government in the administration of the Social Security Act, Title IV. In compliance with 45 C.F.R. 201.2, as a condition to the receipt of Federal funds under Title IV, the Michigan Department of Social Services has submitted a *State Plan* for the administration of Title IV-A—Financial Assistance—Aid to Families with Dependent Children. The State Plan as submitted to the Department of Health, Education and Welfare has been approved and certified as being in compliance with federal statutes and regulations, by the Department of Health, Education, and Welfare.

13. Defendant admits such allegations as are consistent with 42 U.S.C. 602(a)(7) and denies such allegations as are inconsistent therewith. The Department of Social Services method of compliance with this section of the Social Security Act is presently found at State Plan Attachment 2.3E page 2 (copy attached as Exhibit A.)

14. Defendant admits that the following are excerpts from 45 C.F.R. 233.20(a)(6) and (7) promulgated based upon Section 402(a)(7) of the Social Security Act:

45 C.F.R. 233.20(a)(6)(IV): "With reference to commissions, wages or salary, the term "earned income" means the total amount, irrespective of personal expenses, such as income-tax deductions, lunches, and transportation to and from work, and irrespective of expenses of employment which are not personal, such as the cost of tools, materials, special uniforms, or tansportation to call on customers."

45 C.F.R. 233.20(a)(7)(i): "Disregard of earned income; method. (i) Provide that the following method will be used for disregarding earned income: The applicable amounts of earned income to be disregarded will be deducted from the gross amount of "earned income," and all work expenses, personal and nonpersonal, will then be deducted. Only the net remaining will be applied in determining need and the amount of the assistance payment."

State Plan Attachment 2.3-E page 2 sets forth the Department's base for allowing deductions from earned income as published in AP Manual Item 331 for statewide administration. (Exhibit A.)

15. Defendant admits that 45 C.F.R. 206(a)(2)(i) and 206.10(a)(4) are set out in their entirety below:

45 C.F.R. 206(a)(2)(i): "Applicants shall be informed about the eligibility requirements and their rights and obligations under the program. Under this requirement individuals are given information in written form, and orally as appropriate, about coverage, conditions of eligibility, scope of the program and related services available and the rights and responsibilities of applicants for and recipients of assistance. Specifically developed bulletins and pamphlets explaining the rules regarding eligibility and appeals in simple, understandable terms are publicized and available in quantity."

45 C.F.R. 206.10(a)(4): "Adequate notice shall be sent to applicants and recipients to indicate that assistance, including supplemental payments, has been authorized (including the amount of financial assistance) or that it has been denied or terminated. Under this requirement, adequate notice means a written notice that contains a statement that action taken, and the reasons for and specific regulations support such action, and an explanation of the individual's right to request a hearing."

Further answering said paragraph, this Defendant states that the regulations cited above delineate requirements for State plans under Title IV-A of the Social Security Act. It is the department's position that this requirement mandates that information be provided regarding components of the AFDC program and the rights and responsibilities of applicants and recipients in relation to those components.

This position is also derived in part from another provision of federal regulations (45 C.F.R. 205.10(a)(3)). This subsection obligates the department to provide writ-

ten notice of a right to a hearing "at the time of application and at the time of any action affecting his claim." A claim for assistance is affected only by a proposed change or reduction in one or more of the standard allowances in the approved state plan.

45 C.F.R. 206.10(a)(7) states "In cases of proposed action to terminate, discontinue, suspend, or reduce assistance, the agency shall give timely and adequate notice. Such notice shall comply with the provisions of 205.10 of this chapter." Such actions are not proposed in relation to benefits not included as part of the approved State standard of assitance.

16. Defendant admits such allegations as are consistent with MCLA 400.9; MSA 16.409 and Assistance Payments Manual, Item 331 and denies such allegations as are inconsistent therewith. Defendant further notes that AP Manual Item 331, page 2, effective 9-1-78 *Expenses of Employment*, states "$40 is to be used as the standard expense of employment allowance intended to cover expenses incurred by the employed client in earning income. . . ."

State Plan Attachment 2.3-E page 2 (Exhibit A) outlines the Department's provision of this allowance. "A flat amount of $40 is used for any or all of the items indicated in the righthand column above. However, when a recipient can establish that the reasonable expenses of employment, in or out of the flat amount, exceed the flat amount, the expense is allowed." The checked items are: lunches, transportation to and from work, special uniforms, and incidentals.

AP Manual Item 331, page 3, effective 2-1-79, *Expenses of Employment*, states "If the client claims more expenses than the standard deduction, the actual expense may be allowed as deductions in determining the net budgetable earned income but only if the following conditions are met . . . actual expenses must be . . . specifically attributable to earning of income . . . itemized in the Remarks section of the family's current DSS-2D,

Budget Sheet must be verified by receipts and . . . is for an appropriate and reasonable dollar amount for each such expense."

*Day Care as an Expense*—"Since day care is provided to recipients without cost and to non-recipients either without cost or a partial cost based on income, it is not considered an expense of employment for applicants or recipients."

State Plan Attachment 2.3-E, page 2 under the heading "*For employees, the expenses of employment considered are those checked in the following table.* Checked under *child care provided as:* "Service provided or purchased by agency." HEW in its approval allows the Department to consider child care separately from other expenses of employment, as being met by the Department's purchase of these services for the client. Therefore, there is no provision for meeting other costs than those met by the Department child care payment.

The day care payments now provided without cost under Title XX of the Social Security Act will be, as soon as legislative approval is obtained, covered out of Title IV-A finds solely as a deduction to client income. (See Dempsey affidavit-Exhibit B)

17. Defendant admits that the rates cited by the Plaintiffs can be found as reported, in Services Manual Item A-446 effective 9-23-79. These are the maximum rates the Department can pay for the In-Home and Out-of-Home care of children. However, those rates will have no application once the finding source is switched from Title XX of the Act to Title IV-A for child care.

18. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in said paragraph and leave Plaintiffs to their proofs.

19. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in said paragraph and leave Plaintiffs to their proofs. Further answering said paragraph,

Defendant states that the Department is under no obligation to provide applicants for or recipients of assistance with a determination of eligibility for payment in excess of the state AFDC standards. All determinations for applicants and only negative case determinations for recipients, based on approved state standards, require notices of the proposed action and the right of a client to an administrative hearing. Therefore, as the method used by the Department in meeting day care costs of employed AFDC recipients is within the State's approved plan for Title XX the AP worker is under no obligation to send notice to the recipient regarding non-payment of child care in excess of the Department's child care payment.

20. Defendant admits the allegations in paragraph 20.

21. Defendant admits that Plaintiff Blessing began receiving ADC in Washtenaw County approximately October 3, 1979 having had her case transferred from Lenawee County. As of September 4, 1979, she was leasing a residence in Milan, Michigan.

22. Defendant admits that Ms. Blessing began reporting income to the Washtenaw County office in September, 1979. That information is the only source of the Department's knowledge of her employment income.

23. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in said paragraph and leave Plaintiffs to their proofs.

24. Defendant is informed and believes that Ms. Blessing's employment related child care requirements for her children are approximately as follows:

Kelly: 6 hours per day

Sonya: 3 hours per day

25. Defendant admits that the rates for licensed family day care homes are: $5.24 daily for child care over 5 hours; $3.24 daily for less than 5 hours a day. Kelly (aged 5) requires over 5 hours of care daily; Sonya

(aged 8) requires less than 5 = $8.48 which is maximum rate for this case. As to the actual cost Plaintiff Blessing has incurred for child care such costs only became known to Defendant in administrative hearing and to the extent allowable under federal law and regulation the Plaintiff was provided with payment for such costs pursuant to the hearing decision rendered May 2, 1980 (Exhibit C).

26. Defendant admits that Plaintiff Blessing was required to fill out forms relative to earned income particularly Form DSS-2C (Rev. 7-76) (Exhibit D) which on its face indicates spaces for work expenses and which particular expenses are deductible. Plaintiff Blessing's case was handled pursuant to the state plan provisions and manual items cited and explained above.

27. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in said paragraph and leave Plaintiffs to their proofs.

28. Defendant admits that 18.5 cents per mile is the rate used by the Department to reimburse for use of a car. See form DSS-3449 Itemization of Basic Budgetary Allowances, dated 11/24/79 sent to client after her September earning required a budget change. There are three such letters, subsequent to this date in the case record. Above the worker's signature on this form a clear reference to a hearing is made. (Exhibit E).

29. Defendant admits that Plaintiff Blessing submitted to the county department the form attached as Exhibit A to the complaint which was processed by the Department. As to the car repair costs, they were allowed as a deduction, initially, in error and the child care expenses above the amounts paid under Title XX were afforded Ms. Blessing after administrative hearing.

30. Defendant admits the allegations contained in paragraph 30. Based on that hearing request, Ms. Blessing received a decision after hearing affording her all the relief to which she is entitled in this matter.

31. Defendant admits the allegations contained in paragraph 31, except for the reference to "Intake Supervisor" which should be "Ongoing Supervisor" instead.

32. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in said paragraph and leave Plaintiffs to their proofs.

33. Defendant admits that correspondence on the question of allowable expenses related to employment for ADC recipients has been received by him from Paul Webb of HEW (now the Department of Health and Human Services) (Complaint, Exhibits D & E). However, the remaining allegations of said paragraph are denied.

34. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in said paragraph and leave Plaintiffs to their proofs.

35. Plaintiff MWRO lack standing to raise alleged injuries to unnamed or identified members of its organization and to seek relief on their behalf before this Court.

36. Defendant denies that its method of reimbursing ADC recipients for work related expenses, including child care violates the Supremacy Clause of the U.S. Constitution.

37. Defendant denies that Plaintiff Blessing or alleged class members failed to be given proper notice of their rights to claim appropriate work expenses and to request a hearing where negative action was taken by the Department.

38. Defendant denies violation of the Equal Protection Clause of the U.S. Constitution and in support of said denial affirmatively states that the classification in question was rationally based.

39. Defendant denies the allegations contained in paragraph 39.

## AFFIRMATIVE DEFENSES

A. Plaintiffs have failed to properly invoke the subject matter jurisdiction of this Court pursuant to 28 U.S.C. 1343(3) as their constitutional claims of denial of due process and equal protection are frivolous and the Supremacy Clause claim is not cognizable under 42 U.S.C. 1983 so as to give rise to jurisdiction under 42 U.S.C. 1343(3).

B. Plaintiff MWRO lacks standing before this Court to seek any relief on behalf of unidentified members of its organization.

C. Plaintiff Blessing has been afforded all the relief sought herein by hearing decision of an administrative law judge which renders her claim moot and she should be dismissed as a named Plaintiff herein.

D. Defendant's changing of the funding source for child care from Title XX to Title IV-A for employed ADC recipients, renders the declaratory and injunctive claims associated with requested recognition of expenses above the rates outlined in the Services Manual moot.

E. Any and all claims for monetary relief made herein, including retroactive relief, payable out of the state treasury is barred by the U.S. Constitution, Eleventh Amendment.

WHEREFORE, Defendant prays this Court will take the following action:

a) Decline jurisdiction in this matter.

b) Deny class certification in this matter.

c) Deny all relief requested by Plaintiffs both declaratory and injunctive in nature.

d) Dismiss all claims made herein or at least such claims as are moot.

e) Afford Defendant his costs so wrongfully incurred and such other or further relief as is equitable in good conscience.

FRANK J. KELLEY
Attorney General

JANIS MEIJA
Assistant Attorney General

/s/ Robert N. Rosenberg
ROBERT N. ROSENBERG
Assistant Attorney General

512 Commerce Center
Lansing, Michigan 48913
Phone: (517) 373-7700

Dated: June 3, 1980

IV-A STATE OF MICHIGAN

2. For employees, the expenses of employment considered are those checked in the following table.

| Item | Included in flat amount |
|---|---|
| [x] Mandatory payroll deductions | [ ] |
| [x] Lunches | [X] |
| [x] Transportation to and from work | [X] |
| [ ] Tools | [ ] |
| [ ] Materials | [ ] |
| [x] Special uniforms | [X] |
| [ ] Transportation to call on customers | [ ] |
| Other: | |
| [x] Incidentals | [X] |
| [ ] _____ | [ ] |
| [ ] _____ | [ ] |

Child care provided as:

[ ] Cost of care expended by worker.

[X] Service provided or purchased by agency.

[X] A flat amount of $40.00 is used for any or all of the items indicated in the righthand column above. However when a recipient can establish that the reasonable expenses of employment, in or out of the flat amount, exceed the flat amount, the expense is allowed.

[ ] No flat amount is used.

[ ] Other limitations are imposed, as described in operating manual material submitted to the Regional Office.

(continued)

Approval Date 11-1-76 Effective Date 9-2-76

Ev. A.

BEST AVAI

Report income received during:

# MONTHLY INCOME REPORT

Michigan Department of Social Services

| ADC Case Number | ADC Unit/Wkr. No. | Co. Cd. | ADC Worker's Name | Phone Number |
|---|---|---|---|---|
| | | | | |

Client's Name

Address (Number and Street)

City, State, Zip Code

COUNTY RETURN ADDRESS

**INSTRUCTIONS:** This income report is needed to determine your grant amount. Fill in this form completely on the last day of the month shown above. Sign and mail to your County Department of Social Services Office in the enclosed stamped envelope. **If you do not report your income to the County Department of Social Services Office by the 5th (FIFTH) of the month after the month shown above, we will be unable to determine your eligibility for assistance, and your payments may stop.** Be sure to answer each question and sign the form.

**INCOME TO REPORT:** If you earned, received or stopped receiving income or had a change in other income during the report month, list all income and report below. Income includes EARNINGS (salary, wages, tips, commissions and bonuses); free housing or utilities; UNEMPLOYMENT INSURANCE/DISABILITY INSURANCE, workmens compensation, strike benefits, training allowances or incentive payments; SOCIAL SECURITY/RAILROAD RETIREMENT, supplemental security income (SSI), pensions, business, farm, rental, CHILD SUPPORT, or other contributions paid directly to a family member; MILITARY BENEFITS, settlements, tax refunds, and any other money you receive. **DO NOT REPORT YOUR ADC, MEDICAL ASSISTANCE, GENERAL ASSISTANCE, OR FOOD STAMP BENEFITS.**

| WHO RECEIVED INCOME, MONEY, OR BENEFITS | SOURCE OF INCOME, MONEY, OR BENEFITS (If earnings, list employer and employer's address) | HOURS WORKED | DATE(S) RECEIVED | GROSS AMOUNT (Before deductions) |
|---|---|---|---|---|
| | | | | $ |
| | | | | $ |
| | | | | $ |

**YOU MUST SEND ALL PAY STUBS FOR EARNED INCOME OR VERIFICATION OF CHANGES IN OTHER INCOME WITH THIS FORM. IF YOU DO NOT KNOW WHAT VERIFICATION YOU MUST SEND, CONTACT YOUR ADC WORKER.**

**WORK EXPENSES: Complete for earned income only.**

If you had earned income from employment (whether as an employee or from self-employment) you are entitled to a $40 deduction for your personal work related expenses each month. When your expenses are greater than $40 you may choose to claim the actual expenses by listing your work related expenses below. If actual expenses are claimed, **YOU MUST ATTACH RECEIPTS.**

**IF YOU WISH TO CLAIM ACTUAL EXPENSES, complete the report below:**

| Person Claiming Expenses | Days Worked | Hours Worked | TRANSPORTATION EXPENSES (Attach receipts) | | | | OTHER WORK EXPENSES — Required work uniforms, or tools, items, mandatory insurance or union dues, etc. (Attach receipts) | |
|---|---|---|---|---|---|---|---|---|
| | | | Method (car, carpool, bus, etc.) | Days using this method | Daily cost round trip | Daily Miles round trip | Items | Amount |
| | | | | | $ | | | $ |
| | | | | | $ | | | $ |
| | | | | | $ | | | $ |

**INCOME FROM SELF-EMPLOYMENT:** If you were self-employed, attach a separate sheet of paper, if needed, listing and explaining business operating expenses *(attach receipts for business expenses claimed).*

**I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING STATEMENTS ARE TRUE AND CORRECT.**

Client's Signature

Date Signed

DSS-2C (Rev. 7-78) (This form is designed to work with County Envelopes DSS-155 and DPS-339)

LABLE COPY

**ITEMIZATION OF BASIC BUDGETARY ALLOWANCES**
Michigan Department of Social Services

| Name | | | | |
|---|---|---|---|---|
| Case Number: R 3115 818 11 | | | | Date: 11/24/79 |
| County | District | Unit: 3 C 2 | Worker | Other I.D. (As Required) |

Gail Clemens
94 W Main
Milan, Mi. 48160

Under the provision of the Social Security Act, Michigan is required to establish a standard to be used in determining the amount of assistance for which an individual or family is eligible. The standardized requirements below were established on the basis of average consumption patterns and may not represent the actual expenses of your family. Shelter is allowed in the actual amount paid up to the State shelter maximum for your county.

Below is a listing of your basic monthly budgetary allowances as determined at:

- ☐ Application
- ☑ Redetermination — Date Effective: 11-1-79
- ☑ Change in Your Circumstances

| | APPLICATION | REDETERMINATION | CHANGE |
|---|---|---|---|
| ☐ Shelter Allowance | | 160 | |
| ☐ Personal Needs (food, clothing, incidentals) | | 219 | |
| ☐ Heating Fuel | | 50 | |
| ☐ Utilities | | 26 | |
| ☐ Special Needs | | | |
| ☐ Special Needs | | | |
| TOTAL REQUIREMENTS | | 455 | |
| ☐ Net Income Deducted | | 364 | |
| AMOUNT OF GRANT | | 91 | |

* If you need further clarification of your assistance budget or you believe any action of the Department is incorrect, improper or illegal, you may ask for a review, conference or a hearing. This may be done by notifying the local DSS office by telephone, in person, or in written form. The State requires that all requests for a hearing be in written form. These may be sent to your local department or Central Office.

Your Ongoing Caseworker is _____ ←

Very truly yours,
S. Dellarriele
Assistance Payments Worker

DSS-3449 (Rev. 12-78) Previous edition obsolete.

DISTRIBUTION: White - Client; Blue - Case Record

BEST AVAILABLE COPY

STATE OF MICHIGAN
DEPARTMENT OF SOCIAL SERVICES
BUREAU OF ADMINISTRATIVE HEARINGS

Reg. No: 80-04373 (1121)
Case No: C81 K8115818A
Hearing Date: 4-17-80
County: Wayne DSS

IN THE MATTER OF: GAIL BLESSING, CLAIMANT

## HEARING DECISION

*EXHIBITS ADMITTED INTO EVIDENCE*

Claimant Exhibit A—Receipt/February 25, 1980

Claimant Exhibit B—Three receipts for child care costs for 2/8/80, 1/25/80 and 4/80

Claimant Exhibit C—Copy of cancelled checks drawn on claimant's account, checks #147, #131, #119

Claimant Exhibit D—Copy of cancelled checks drawn on claimant's account, checks #155, #174, #183

Department Exhibit #1—Budget Sheet, effective date 10/16/79

Department Exhibit #2—Budget Sheet, effective date 11/1/79

Department Exhibit #3—Monthly income report, DSS-2C, signed 10/31/79

Department Exhibit #4—Budget Sheet, effective 12/1/79

Department Exhibit #5—Budget income report, Department Form 2C, signed 11/30/79

Department Exhibit #5—Budget sheet, effective date 1/1/80

Department Exhibit #6—Monthly income report, Department Form 2C, signed 1/1/80

Department Exhibit #7—Budget Sheet, effective date 2/1/80

Department Exhibit #8—Monthly income report, Department Form 2C, signed 2/1/80

Department Exhibit #9—Budget Sheet, effective March 1, 1980

This case is before the undersigned Administrative Law Judge pursuant to MCLA 400.37; MSA 16.437 and MCLA 400.9; MSA 16.409 upon the claimant's request for a hearing to protest the department's failure to budget child care costs as work related expense and failure to inform the claimant of a method to deduct actual mileage expenses.

*ISSUES*

(1) Whether the department's denial of budgeting claimant's child care costs as work-related expenses was correct?

(2) Whether the claimant was informed of her right to list actual transportation expenses as an expense of employment for grant budgeting purposes?

*FINDINGS OF FACT*

Having had an opportunity to observe the demeanor of the witnesses, based upon the substantial weight of the credible evidence presented, the Administrative Law Judge makes the following pertinent findings:

(1) That claimant is an employed ADC recipient.

(2) That claimant employs a day care provider recommended by the department.

(3) The claimant's day care costs are above the amount allotted or granted by the department.

(4) The department has refused to accept the claimant's day care costs as actual expenses of employment for granting budgeting purposes.

(5) The claimant uses her automobile for transportation to and from work.

(6) The claimant has been informed in writing that actual transportation costs relating to work can be deducted from income for budgeting purposes.

(7) The claimant did not submit or request actual transportation expenses because of her confusion regarding verification requirements.

*CONCLUSIONS OF LAW*

This Administrative Law Judge agrees with the claimant's position in part. The decision of Administrative Law Judge Baslinger relating to the same issue in the case number 81-K3710556A, hearing held January 18, 1980, is adopted in pertinent part as follows:

The Aid to Dependent Children (ADC) program is established by Title IV-A of the Social Security Act, implemented by federal and state regulations, and administered in Michigan by the Department of Social Services (the department) according to its Assistance Payments Manual (APM).

The Social Security Act at 42 USC 602(a)(8), requires that "the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children . . . as well as any expenses reasonably attributable to the earning of such income."

The relevant federal regulation, 45 CFR 233.20(a)(3)(iv), mandates that ". . . in determining the availability of income and resources, the following will not be included as income: (a) income equal to expenses reasonably attributable to the earning of income . . . ."

APM, Item 331, page 3, provides, concerning expenses of employment:

If the client claims more expenses than the standard deduction, the actual expenses may be allowed as deductions in determining the net budgetable earned income but only if the following conditions are met:

- actual expenses claimed must be personal expenses incurred by the employed client that can be specifically attributable to the earning of income.
- actual expenses claimed must be itemized in the Remarks section of the familiy's current DSS-2D, Budget Sheet.
- the amounts itemized must be verified by receipts and must be reported monthly along with income, by the fifth of the month following the month the income was received.
- the AP worker must determine whether or not each item listed is for an appropriate and reasonable dollar amount for such an expense."

At the hearing, the worker pointed out APM Item 331, page 3, which reads in pertinent part:

> "Since day care is provided to recipients without cost and to nonrecipients either without cost or at partial cost based on income, it is not considered an expense of employment for applicants or recipients."

Where, as here, the full cost to claimant of the day care services which are necessary to enable her to maintain employment is not provided by the department, the additional cost to her is reasonably related to the earning of income and, under the federal law cited above, is considered a deductible work-related expense. The APM Item to which the worker referred goes beyond the statute and regulation in restricting the use of the deduction, and therefore cannot be used as a basis to deny claimant consideration of her cost of day care as a work-related expense.

The aforestated manual item has been changed the effective date being April of 1980. The new item is silent with regard to child care expenses as claimed expenses of employment. It can be inferred that the department intends to continue its policy of disallowing said claim for the same reasons as aforestated. It must be concluded that the disallowance of child care costs above the amount contributed by the department would be improper.

The second issue to be decided is the claimant's claim for transportation expenses incurred for employment. It is the claimant's position that the department failed to adequately inform her of her rights to deduct mileage expenses from income for grant budgeting purposes. It has been determined that the claimant had reported her income on numerous occasions using department form DSS-2C which are exhibits and part of this opinion. This form contains simple instructions for reporting expenses above the standard allowance. The claimant's own testimony revealed she was aware that mileage expense could be deducted but she did not understand how to verify said costs. At this point, the claimant became aware of her rights under the program; the department obviously met its obligation and was in compliance with 45 CFR 206.10(a)(2)(i). The claimant's confusion as to her rights in this case arose not from the department's information but from the claimant's own circumstances. The department would have no way of knowing that the claimant could not discern some method of verifying her mileage or travel expenses. If the claimant had approached the department and the department did not proceed to clarify their position as it related to her circumstances, then the department would have failed in its obligation to inform the claimant of her rights under the program. However, these were not the circumstances in this case.

Having found no "incorrect action" on the part of the department, a ruling granting retroactive payments would be improper.

*DECISION AND ORDER*

The Administrative Law Judge, upon the above findings of facts and conclusions of law, decides that the noninclusion of the claimant's child care contribution or costs as an expense of employment for ADC budgeting purposes is incorrect. It is further found that the department has given the claimant adequate information relating to transportation expense deductions.

Accordingly, the department is ordered to recompute the claimant's budget for the length of her employment to reflect her child care costs and grant her supplementation accordingly. The department is further ordered to consider the claimant's child care costs in computing her future monthly budgets. In computing the supplementation and future budgets, the department is to deduct the amount the claimant receives from the department for child care.

/s/ Martin J. Lofman
MARTIN J. LOFMAN
Administrative Law Judge

Date signed: May 2, 1980

Date mailed: May 08 1980

*NOTICE*: The law provides that within 30 days of receipt of the above Decision and Order the claimant may appeal it to the circuit court for the county in which he lives.

ML/dp

cc: Gail Blessing
Washtenaw County DSS
Robert Johnson
Judge Martin J. Lofman
Administrative Hearings (4)
William Dailey
William Barham

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. 80 71479

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[Title Omitted in Printing]

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## AFFIDAVIT OF JOHN T. DEMPSEY

STATE OF MICHIGAN )
)
COUNTY OF INGHAM )

JOHN T. DEMPSEY, being first duly sworn, deposes and says as follows:

1. That he is the Director of the Michigan Department of Social Services and has occupied that position since February, 1975.

2. In such capacity, he is responsible for the administration of the Aid to Families with Dependent Children (AFDC) and Title XX Social Services programs in Michigan.

3. That by letter of September 30, 1979, he informed the Director of the Michigan Department of Management and Budget of actions the Department of Social Services intended to take in response to the Governor's request that said Department save $29.0 million of the funds currently budgeted for fiscal year 1979-80. Of the projected savings, $10.0 million was attributed to a shifting of day care expenses of working AFDC recipients from the Title XX program to the AFDC program. (Attachment A.)

4. That the executive budget recommendations submitted by Management and Budget to the heads of the Appropriations Committees of the State legislature as

part of the appropriation process for fiscal year 1980-81 includes the shifting of day care funding to the AFDC program at a projected saving of $6.60 million. (Attachment B.)

5. That, upon legislative approval of the proposed shift in funding from the budget line items for the Title XX program to those for the AFDC (Title IVA) program, the Department will promptly implement all necessary policy changes so that AFDC applicants and recipients who are qualified will, to the extent allowed under federal law and regulation governing that program, be able to have allowable expenses of employment deducted from their earned income to offset a portion of the grant reduction attributable to such income. No Title XX funding will be available for employed AFDC recipients to defray day care costs.

/s/ John T. Dempsey
JOHN T. DEMPSEY
Director,
Michigan Department of
Social Services

Subscribed and sworn to before
me this 2nd day of March, 1980.

/s/ Signature illegible
Notary Public, [Illegible] County,
Michigan

My commission expires: [Illegible]

EXHIBIT A

STATE OF MICHIGAN
DEPARTMENT OF SOCIAL SERVICES

*MEMORANDUM*

Date June 20, 1980

To: AP Supervisors (Ann Arbor)
Services Supervisors (Ann Arbor)

From: Ralph Carnegie
Deputy Director

Subject: CIS Message Received 6-20-80 10:50

Local Office Managers: CIS will not be up 6-21-80. See 5-13 memo from FSA.

Instructions on Child Care Costs as an employment expense in adv. AP Bulletin # 80-14 page 3 and attached revisions to Item 331 are to be disregarded. The Legislature's final decision is to continue Day Care Services under Title XX. Child Care expenses may not be allowed in calculating earned Income budgets. All other material in the release is correct. Policy will be modified and rates changed. Details to follow this afternoon or Monday.

RC:yh

cc: Kenneth Oettle
Dave Krehbiel
Jeff Heath
Dean Denslow
Joanne Troy

EXHIBIT B

STATE OF MICHIGAN
DEPARTMENT OF SOCIAL SERVICES

No. 80-16

ASSISTANCE PAYMENTS MANUAL
BULLETIN

Office of Income Assistance

EFFECTIVE: July 1, 1980

SUBJECT: AP Item 331
Follow-up to Morning VDT Message of June 20, 1980, Regarding Day Care

The purpose of this bulletin is to rescind certain information contained in AP Bulletin 80-14. AP Bulletin 80-14 stated that child care costs were an allowable expense of employment effective 7-1-80, due to termination of Title XX day care payments.

The Department has decided to continue Title XX funding for day care payments. Therefore, references to child care expenses are being deleted from AP Item 331. Child care will not be an allowable expense of employment in calculating budgetable earned income.

Prospective budgets calculated for July and August with a child care deduction allowed must be changed to remove this deduction. This change must be made if it is possible to affect any check(s) for these months. If the case has been opened, timely notice of resulting negative actions must be granted.

Forms DSS-2C and DSS-2CX, Monthly Income Report, contain a space for the client to claim child care expenses.

It is too late to change these forms. Workers must be careful not to include child care in any calculations of actual expenses of employment.

*AP MANUAL MAINTENANCE*:

New Pages:

AP Item 331, pages 4-6 (Rev. 7-3-80, Eff. 7-1-80)

Obsolete Pages:

AP Item 331, pages 4-7 (Rev. 6-13-80, Eff. 7-1-80, Released with AP Bulletin 80-14)

/s/ Fred Lawless
FRED LAWLESS, Director
Field Services Administration

Approved: /s/ [Signature illegible]
Director

Distribution: AP Manual Holders
Issued: 7-3-80
May be discarded upon completing manual maintenance

EXHIBIT C

STATE OF MICHIGAN
DEPARTMENT OF SOCIAL SERVICES

No. 80-14

ASSISTANCE PAYMENTS MANUAL
BULLETIN

Office of Income Assistance

EFFECTIVE: July 1, 1980

SUBJECT: AP Item 330, Principles of Budgeting Income

AP Item 331, Earned Income

AP Item 511, Supplemental Payments

AP Item 520, Notice of Case Actions

Federal regulations regarding the reporting and budgeting of income are being implemented. In addition, several clarifications of existing policy have been made.

A summary of the changes follows:

*AP Item 330*:

(1) Persons who are required to report income monthly must do so by completing a specified-reporting form, in addition to providing appropriate verification.

(2) Form DSS-2C has been revised and retitled, "Monthly Income Report." It may only be used to report income. Form DSS-2C will be machine mailed to clients who are identified on CIS as being required to file a monthly income report. The first forms will be mailed with the warrants for the second half of July, 1980. An insert will be mailed to

all C, S, I, and R clients with the warrants for the first half of July, explaining the reporting requirements.

Form DSS-2CX is an alternate of Form DSS-2C and is designed for hand issuance by the worker.

Samples of Forms DSS-2C, DSS-2CX, and the insert are attached.

(3) The policy regarding treatment of stopped income has changed. Any income received in the base month must be budgeted in the corresponding payment month, unless the income was received and stopped prior to the date of application.

Distribution: AP Manual Holders

Issued: 6-13-80
May be discarded upon completion of manual update.

(4) Earned income from self-employment must be reported and budgeted each month. Policy effective 4-1-80 instructed that self-employment income be averaged. This was done because the policy regarding treatment of stopped income often resulted in much self-employment earnings being excluded, due to the erratic nature of the income. Since the Federal regulations do not recognize stopped income as a situation requiring special treatment, with the exception of income stopped prior to application, this problem will no longer occur.

(5) Fluctuating unearned income, including income which is received weekly or bi-weekly (i.e., UCB) must be reported monthly via the DSS-2C or DSS-2CX, with appropriate verification.

(6) Federal regulations allow waiver of timely notice of negative actions resulting from information reported on the monthly income report form. Michigan has

elected this portion to allow greater flexibility in processing income budgets.

Adequate notice of the action is still required. Therefore, CIS is being modified to allow entry of a negative action date without entry of a "9" as the first position of the negative action code. This will result in generation of a DSS-1605.

(7) Federal regulations require that supplements be made available to clients who request them due to decreased income. The instructions for this type of supplement have been placed in this item, since it is so closely related to the budgeting process.

(8) Policy regarding the exception to prospective budgeting at reapplication has been deleted.

(9) The treatment of income when adding a member to an active case has been clarified under "INCOME IN AN ONGOING CASE."

(10) When income starts, a prospective eligibility budget must be calculated. If the case is ineligible based on the prospective eligibility budget, the case may be closed. If the case is still eligible based on the prospective eligibility budget, actual retrospective income is used to determine the grant.

(11) Use of Report DN-029, "Support Collection vs. Grant" has been clarified. This report was recently revised to include the month in which the report is to be used. A sample is attached.

(12) "VERIFICATION REQUIREMENTS" have been expanded to include guidelines for prospective budgets.

*AP Item 331*

(1) Policy regarding self-employment has been revised to delete references to reporting requirements and averaging of income.

(2) References to specific types of work as forms of self-employment have been deleted. This has been done to avoid potential problems for the Internal Revenue Service and the Social Security Administration, who have much more specific criteria for determining whether or not a person is self-employed.

It is the client's responsibility to inform the Department if he considers himself self-employed and wishes to claim operating expenses. AP workers are not to instruct clients to claim self-employment status in order to take advantage of AP budgeting procedures.

(3) Clients who wish to claim actual expenses of employment may now include child care costs as an expense of employment reasonably attributable to earning income. Day care payments for employed ADC clients will no longer be paid under Title XX.

Child care expenses are to be allowed in prospective budgets for July and August. For cases on retrospective budgeting, child care expenses paid in July and reported in August will be reflected in calculating the September grant.

A separate memorandum will be released to provide a more detailed explanation of the conversion from Title XX payments to Title IV-A (ADC).

(4) Verification requirements for income from self-employment have been modified; reference to Form DSS-2CX has been added; suggested methods of verification of expenses have been added.

*AP Item 511*

(1) Policy regarding supplements for decreased income has been added. This deletes the reference to "loss" of income, which is simply treated as a decrease.

(2) Effective 7-1-80, supplements will be authorized on-line to CIS. This coding structure has been changed. Reference to the broad category of "underpayments," as opposed to increased need, has been deleted to allow more specific identification of the reason for supplementation.

The DDS-13 has been revised to reflect new policy and to serve as a CIS input document.

(3) On-line supplements require a great deal of responsibility on the part of local office staff to insure correct application of policy. Therefore, retroactive adjustments due to court orders, and amounts in excess of $1,000 (unless the reason is a retroactive adjustment due to an administrative hearing) must be approved by the local office director or his designee.

(4) Federal regulations require a notice to the client when a request for a supplement is approved or denied.

*AP Item 520*

(1) Policy regarding required notices for negative actions due to monthly income reports has been added.

(2) This item has been written in the new AP Manual format.

*Other*

(1) Report RR-030, Monthly Income Report Listing, will be generated each month. This report contains a listing of those cases which are identified on CIS, as of the report run date, as being required to file a monthly report. This report must be used to keep track of those cases that are required to report income monthly. A mock-up of the report is attached.

(2) On June 21, 1980, an automatic conversion will be done to identify cases that will be required to report. A separate conversion notice has been published.

(3) Report GA-790, Supplemental Payments Listing, will be issued each month, with one copy to the worker and one copy to the supervisor.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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Civil No. 80 71479

[Title Omitted in Printing]

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**MEMORANDUM AND ORDER**

Plaintiffs moved for class certification in this action against defendant Dempsey in his capacity as director of the Michigan Department of Social Services. Plaintiffs allege that defendant is administering the Aid to Families with Dependent Children (AFDC) program in violation of federal statute and regulations and in violation of their constitutional rights to equal protection of the laws. Plaintiffs move for certification of a class, with themselves as class representatives, defined as:

> . . . all applicants for or recipients of Aid to Families with Dependent Children (AFDC) in Michigan who have claimed or will claim, or who have not been or will not be adequately informed of their right to claim, excess child care costs and other reasonable actual expenses incurred in connection with their employment and have had or will have their eligibility or level of benefits determined without regard to such actual expenses of employment.

Motion for class certification, ¶ 1.

The individual plaintiff, Gail Blessing, is a recipient of AFDC, who requested that the costs of child care and car repair expenses be deducted from her income in determining her level of benefits. Her request was denied. She alleges that she was not initially informed of her right to deduct such expenses and that she was not in-

formed of her right to request a hearing on the denial of the deductions. Plaintiff Blessing filed a request for hearing on March 3, 1980, and had a prehearing conference on March 17, 1980. Exhibits B and C to the complaint was filed on April 11, 1980. Plaintiff received her administrative hearing on April 17, 1980. The complaint was served on April 18, 1980. The Department's administrative decision was issued on May 2, 1980. Exhibit attached to defendant's brief in opposition. Although plaintiff Blessing was not granted all the relief she requested, the administrative decision did hold that she could deduct the actual cost of child care expenses and she was granted a retroactive recomputation of her benefits. Although plaintiffs allege that defendant has refused to allow deductions for several different types of costs of employment, the most specific allegations and the core of their complaint refer to the deduction of child care expenses. In deciding whether plaintiff Blessing is a suitable class representative, we must take into account the fact that she has received the relief she has requested regarding child care expenses.[1]

We note first that we are not dealing here with an attempt by defendant to prevent class certification by granting relief to the potential class representatives. If that were the case, we would not hesitate to hold that defendant could not evade class certification by granting relief to the named plaintiffs. *Blankenship* v. *Secretary of Health, Education and Welfare*, 587 F. 2d 329 (6th Cir. 1978). *Accord, Deposit Guaranty National Bank* v.

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[1] Defendant argues that plaintiff Blessing's claims are entirely moot because of the relief she has received in the administrative hearing. But it is clear that she has not received all the relief she requested. The administrative decision ruled against plaintiff on her claim that she did not receive adequate notice of her right to deduct mileage expenses. Thus Blessing's claims are not all moot, although her child care deduction claim is. The question here is, given the mootness of that child care claim, whether she is an appropriate class representative.

*Roper*, 48 U.S.L.W. 4279, 4283 (U.S. March 19, 1980). But in this case it is clear that the administrative process that resulted in Blessing's relief was in motion before the complaint was filed and the relief she received was not affected by the filing of this suit and was not an attempt to prevent class certification. A class representative must meet all of the requirements of Federal Rule of Civil Procedure 23(a) and one of the subsections of Federal Rule of Civil Procedure 23(b). In deciding whether plaintiff Blessing is an appropriate class representative, we are concerned primarily with Rule 23(a)(3) and (4). Are plaintiff Blessing's claims now "typical of the claims . . . of the class" and will she "fairly and adequately protect the interests of the class"? We hold that plaintiff Blessing does not meet these requirements.

It is clear that the focus of plaintiff's complaint is the question of deduction of the actual cost of child care expenses. This is the only specific deduction that is consistently cited in the complaint, although the complaint also claims that deductions for "other expenses of employment" were denied. The correspondence from the regional commissioner of the Social Security Administration attached to the complaint, Exhibits D and E, deals only with child care expenses. The complaint clearly alleges that there is a consistent policy of denying deductions for child care expenses. Our reading of the complaint leads us to conclude that this is the only instance where there is a consistent policy resulting in reduction or denial of benefits. Although there may be other instances when other deductions are disallowed, the complaint does not allege a consistent policy with regard to other expenses. Thus, we must conclude that the majority of the members of the proposed class are AFDC applicants or recipients whose deductions for child care expenses were disallowed. This compels us to find that plaintiff Blessing's claims, which no longer include an active claim for deduction of child care expenses, are not typical of the members of the proposed class.

Given this lack of typicality, we doubt whether Blessing can fairly and adequately protect the interests of the members of the proposed class. At the hearing we inquired whether Blessing would be willing to pursue the claim after receiving administrative relief and asked whether she would be willing to bear the cost of continued litigation. Her counsel stated that the Michigan Clinical Law Program, with which he is affiliated, has a litigation fund from which expenses could be paid. But it is not the willingness and zeal of plaintiff's attorney that we are concerned about, but rather that of the proposed class representative. *Cf. LaMar* v. *H. & B. Novelty & Loan Co.*, 489 F. 2d 461, 465 (9th Cir. 1973); 3B Moore's Federal Practice, ¶ 23.07[2], p. 23-218. If plaintiff Blessing has already received relief on the major claim of the class members, her lack of a personal stake raises doubts about whether she would be motivated to pursue that claim on behalf of the class members. With such doubts, we must hold that plaintiff Blessing has not met her burden of showing she is entitled to maintain a class action, *Senter* v. *General Motors Corp.*, 532 F. 2d 511, 522 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976). Because we find that plaintiff Blessing does not meet the requirements of either Rule 23(a)(3) or (4), her motion for class certification must be denied.

Co-plaintiff Michigan Welfare Rights Organization (MWRO) also joins in this motion for class certification. It alleges that it is an association of recipients of public assistance, the majority of whom receive AFDC. Complaint, ¶ 8. It alleges that "some" of its members have contested denial of deductions and have received favorable administrative determinations and that "other recipients and applicants" have not contested denial of deductions. *Id.*, ¶ 19. MWRO states that it has received "numerous complaints" from its members, *id.*, ¶ 32, and that it "believes" that its members have suffered harm. *Id.*, ¶ 35. We have reviewed the complaint and briefs for more particularized allegations of the claims of members

of MWRO and find none. These conclusory allegations are simply not sufficient to establish that the claims of members of MWRO are typical of the claims of the members of the proposed class. Thus, MWRO has not met its burden of showing that it is entitled to maintain a class action. We hold that MWRO does not meet the requirements of Rule 23(a)(3) and that its motion for class certification must be denied.[3]

NOW, THEREFORE, IT IS ORDERED that plaintiffs' motion for class certification be and the same is hereby DENIED.

/s/ Robert E. DeMascio
ROBERT E. DEMASCIO
United States District Judge

Dated: January 9, 1981

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[3] The allegations in the complaint are sufficient to establish MWRO's standing to assert the claims of its members and MWRO is thus a proper plaintiff in this action. *Warth* v. *Seldin*, 422 U.S. 490, 511 (1975). Our holding here is limited to the question of MWRO's suitability as a class representative.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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Case No. 80-71479

[Title Omitted in Printing]

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## INTERVENOR COMPLAINT FOR DECLARATORY INJUNCTIVE AND OTHER RELIEF

### I.

### PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief to redress the Defendant's failure to administer Michigan's Aid to Families with Dependent Children Program (ADC or AFDC) consistently with the applicable federal statutes and regulations and the Fourteenth Amendment to the United States Constitution. More specifically, Plaintiff-Intervenor alleges that the Defendant has failed to allow ADC applicants and recipients to deduct actual costs of child care from their earned income in determining grant eligibility as required by § 402(a)(7) of the Social Security Act and regulations under the Act, and has failed to give said applicants and recipients adequate notice of their rights and remedies as required by the federal regulations and the Due Process clause of the Fourteenth Amendment to the United States Constitution. Plaintiff-Intervenor further alleges that Defendant's failure to allow child care costs to be deducted while allowing other actual expenses of employment to be deducted draws distinctions among recipients without any rational basis in violation of the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

2. Plaintiff-Intervenor brings this suit to request injunctive and declaratory relief on behalf of herself and all persons throughout the State of Michigan who are, have been, or will in the future be adversely affected by the Defendant's policies and practices.

## II.

## JURISDICTION

3. Plaintiff's actions for declaratory and injunctive relief are authorized by:

(a) 28 USC §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure, which relate to declaratory judgments;

(b) 42 USC § 3983 which provides for redress of any deprivation, under color of state law, of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and laws of the United States.

4. Jurisdiction is conferred upon this Court by 28 USC § 1343(3), the pendent jurisdiction doctrine and 28 USC § 1331.

## III.

## CLASS ACTION

5. The individual named Plaintiff-Intervenor brings this action on her own behalf and, pursuant to Rules 23 (a) and 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all other persons similarly situated. The members of the class similarly situated to the named Plaintiff-Intervenor are all applicants for and recipients of ADC in Michigan, who have unsuccessfully claimed or will claim, or who have not been or will not be adequately informed of their right to claim, excess child care costs incurred in connection with their employment, and who consequently have had their eligibility or level of benefits determined without regard to such actual expense of employment.

6. The requirements of Rule 23 are met in that: the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of all class members; the representative parties will fairly and adequately protect the interests of the class; and the party opposing the class has acted on grounds generally applicable to the class, i.e., failing to consider all reasonable costs as actual expenses of employment, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

## IV.

## PLAINTIFF-INTERVENOR

7. The individual named Plaintiff-Intervenor is a current recipient of benefits under the ADC Program, who has requested that the cost of child care necessitated by her employment be deducted from her earned income as an actual expense of employment in the determination of the amount of her ADC grant and whose request has been denied.

## V.

## DEFENDANT

8. The Defendant John T. Dempsey is the Director of the Michigan Department of Social Services (the "single state agency" for Michigan under Title IV of the Social Security Act) and is responsible for development of departmental policy regarding the ADC program, implementation of rules and regulations of the Department for administering the said program in accordance with the applicable rules and regulations of the Federal government under MCLA 400.10, and 42 USC § 602.

## VI.

## FACTUAL ALLEGATIONS

9. Defendant Dempsey must comply with the Social Security Act and applicable federal regulations thereunder promulgated by the Department of Health, Education and Welfare (HEW) in order for the Michigan Department of Social Services (the Department) to continue to receive matching federal funds.

10. The Social Security Act, in 42 USC § 602(a)(7) requires that the State Department consider "any expenses reasonably attributable to the earning" of income in determining eligibility for AFDC.

11. Regulations promulgated by HEW in 45 CFR §§ 233.20(a)(6)(iv) and (7)(i) require that "all work expenses" be deducted from earned income in determining need.

12. Regulations promulgated by HEW in 45 CFR § 206.10(a)(2)(i) and (4) require that adequate notice of an applicant's rights be given and 45 CFR § 205.10 (a) requires that whenever action is taken on an ADC case, notice of hearing rights must be given.

13. Section 402(a)(1) of the Social Security Act and regulations promulgated by HEW in 45 CFR § 205.120 (1979) require that a state plan for aid to needy families operate on a statewide basis in accordance with equitable standards for assistance and administration that are mandatory throughout the state.

14. The defendant has promulgated and is responsible for enforcing certain state regulations regarding the determination of need pursuant to MCLA 400.9; MSA 16.409. Such regulations provide a standard work expense deduction of $40.00 per month for working applicants or recipients of ADC. Such regulations provide further, in Assistance Payments Manual Item 331, page 4, for deduction of certain expenses for transportation, meals, mandatory payroll deductions and required related

clothing in arriving at net budgetable earned income, and can be verified by receipts or otherwise, but do not allow for deduction costs of child care necessary to allow a recipient or applicant to work. Assistance Payments Manual Bulletin Letter 80-16 provides that child care is "not an allowable expense of employment in calculating budgetable earned income."

15. The defendant administers another program implemented as part of Michigan's plan for social services under Title XX of the Social Security Act, 42 USC § 1397, *et seq.* That program provides, as set forth in Services Manual Item A-416, page 2a, that all employed recipients of ADC qualify for Department payment of the full cost of child care up to maximums set by the Department.

17. Many applicants for and recipients of ADC have not been informed that they can deduct excess child care costs as an actual expense of employment or have requested, but have been denied, such deduction and have not been informed of their right to a hearing on that matter.

18. Some applicants and recipients who protest such denials, despite lack of notice as to their rights, are eventually allowed the child care deduction, despite the contrary published regulations of the Department, usually after an administrative hearing.

19. Plaintiff-Intervenor Johnny Green resides in Ypsilanti, Michigan. At all times pertinent hereto, she is and was a recipient of ADC (case number K8148787A) through the Washtenaw County Department of Social Services on behalf of herself and her child because of the continued absence from the home of the child's father.

20. In November 1979 Ms. Green began working in Ann Arbor, Michigan, being paid $333.00 every two weeks for approximately 40 hours per week. She has continued to work up to the present time.

21. Ms. Green's employer's place of business is 10 miles from her home and she must travel that distance

daily. At first she drove her car, but it has since expired. She now takes a bus at a cost of $1.50 per day for a weekly total of $7.50.

22. Because of her job, Ms. Green has had to make arrangements for the care of her child while she is at work. Approximately 42.5 hours of day care are necessary for her child each week.

23. The maximum rate which the defendant will pay for licensed day care for her child is $35.00 per week. Though she has tried, Ms. Green has been unable to find suitable day care at a cost within this limit. The cheapest suitable day care arrangement which she has been able to procure costs $50.00 per week for an average cost of $10.00 per day. This means that Ms. Green must pay approximately $15.00 per week for day care above the $35.00 provided by the Department.

24. For the first year of her employment, Ms. Green was able to find a child care center which would care for her child for the Title XX amount paid by the Department. However, in October 1980, building authorities forced that center to close and Ms. Green was required to find another provider. In November 1980, that provider charged, and Ms. Green paid, $39.00 for care of her child while at work. A receipt for this amount is attached to this Complaint as Plaintiff-Intervenor's Exhibit A.

25. After learning from a Michigan Legal Services Newsletter that federal law required that child costs be allowed as a work expense, Ms. Green requested a work expense deduction for the $39.00 in day care which she had paid on the monthly income report form which she filed with her caseworker on December 5, 1980. Her caseworker denied the request and informed her by a letter dated December 1980 that "[b]abysitting is not an allowable deduction of work expenses." A copy of this letter is attached to this Complaint as Plaintiff-Intervenor's Exhibit B. Since having her request denied, Ms. Green continues to pay approximately $15.00 per week.

Copies of receipts dated December 12, 1980 and January 15, 1981 for her payments through January 9, 1981 are attached as Exhibits C and D.

26. At no time was Ms. Green informed by employees of the Department of Social Services that her actual expenses for child care could be allowed as a deduction nor was she informed of her right to a hearing following denial of her request to have them allowed as a deduction.

27. A number of other applicants for and recipients of ADC have complained of the Department's failure to allow excess child care costs as deductions from earned income. On their behalf, attorneys from the office of Legal Services of Southeastern Michigan initiated a correspondence with Defendant and with Paul E. Webb, Regional Commissioner of the Department of Health, Education and Welfare (HEW), requesting that Item 331 of the AP Manual be changed. Mr. Webb, in a letter dated May 9, 1978, advised Defendant Dempsey that "if the amount [of child care allowance] under your service plan does not meet the actual cost of child care, it will be necessary to revise your Title IV-A plan to assure that all actual reasonable expenses of employment are considered." A copy of that letter is attached as Plaintiff's Exhibit E and by this reference incorporated herein. A subsequent letter from Mr. Webb, dated October 10, 1978, again refers to the illegality of the prohibition on deducting child care expenses in Item 331 stating: "If AFDC applicants and recipients are being required to pay excess child care costs, please advise us what corrective actions you intend to take to obtain compliance with Section 402(a)(7) of the Social Security Act". A copy of that letter is attached as Plaintiff's Exhibit F and by this reference incorporated herein. Despite being apprised of the Item's illegality, Defendant has failed to change the policy and has offered no reasonable explanation for failing to do so. As a consequence a great number of applicants and recipients are daily being denied the benefits which Congress has clearly intended that they be provided.

28. On May 29, 1980, Defendant Dempsey wrote to the Department of HEW and again inquired as to the legality of a maximum deduction for day care as an expense of employment and received a reply dated December 15, 1980, from Ira Goldstein, Acting Associate Commissioner for Family Assistance, indicating that such maximum limitations on deductions would violate § 402 (a) (7) and (8) of the Social Security Act. Copies of the letters of Mr. Dempsey and Mr. Goldstein are attached to this Complaint as Plaintiff-Intervenor's Exhibits G and H respectively.

## VII.

## FIRST CLAIM FOR RELIEF

29. The failures of the Defendant Dempsey, as set forth above, to allow Plaintiff-Intervenor and her class to claim actual costs of child care when they exceed the standard $40 per month work expense allowance violates the requirements of § 402(a) (7) of the Social Security Act, 42 USC § 602(a) (7), and the regulations thereunder, 45 CFR §§ 233.20(a) (6) (iv) and (a) (7) (i) and therefore contravene the Supremacy Clause of the United States Constitution.

## VIII.

## SECOND CLAIM FOR RELIEF

30. The failures of the Defendant Dempsey, as set forth above, to require that applicants for and recipients of ADC be clearly informed of their right to claim actual work expenses which exceed the standard amount, including child care costs in excess of the Department of Social Services subsidy and mileage, and of their right to request an administrative hearing to contest Defendant's employees' refusals and failures to include as work expense deductions all actual expenses incurred in connection with employment, including child care costs in excess of the

subsidy provided violate the rights of Plaintiff-Intervenor and her class under 45 CFR § 206.10(a)(2)(i) and (a)(4), 45 CFR § 205.10(2)(3), and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

IX.

THIRD CLAIM FOR RELIEF

31. The Defendant, by promulgating and carrying out the provisions of AP Manual Item 331, allows some actual work expenses to be deducted, but disallows child care expenses in excess of the maximum subsidy paid by the Department. In light of the purposes of the ADC program, no rational basis exists for allowing some actual expenses of employment but not allowing others. Consequently, the distinction drawn in Item 331 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

FOURTH CLAIM FOR RELIEF

32. The practices and policies of the Defendant, as set forth above, violate the requirements of Section 402(a)(1) and (3) of the Social Security Act, 42 USC § 602(a)(1) and (3), and the regulations promulgated thereunder, 45 CFR § 205.120, which require that a state's AFDC plan operate on a statewide basis with equitable standards of assistance and administration that are mandatory [illegible], in that

(a) some ADC recipients and applicants who have child care expenses are informed that such a deduction is not allowed and are forced to bear the expense of child care over the Title XX amount themselves, while others are allowed such deductions, generally after an administrative hearing is requested and held; and

(b) among those ADC applicants and recipients who request hearings, whether or not the deduction is granted is decided, not according to any consistent written policy,

but according to the view of each individual Administrative Law Judge regarding the validity of official Department policy in light of contrary federal law.

## X.

## EQUITY

33. Plaintiff-Intervenor and the class she represents, have no plain adequate or complete remedy at law to redress the above stated deprivations of their federal and state constitutional, statutory, and regulatory rights, and are suffering and will continue to suffer irreparable harm therefrom unless relief sought herein is granted by this Court.

## RELIEF

WHEREFORE, Plaintiff-Intervenor, on behalf of herself and all others similarly situated, prays that this court:

(a) Assume jurisdiction of this cause pursuant to 28 USC §§ 1343 and 1331;

(b) Determine by order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action may be maintained as a class action;

(c) Enter a final judgment, declaring that the Defendant Dempsey's action in denying full deduction of all actual expenses, including child care costs, as expenses of employment, violates the Social Security Act, 42 USC § 601 *et seq.*, the regulations thereunder; and the Equal Protection Clause;

(d) Enter a final judgment declaring that the Defendant's action in failing to give adequate notice of recipients and applicants with respect to the deduction of actual employment-related expenses and of their rights to a hearing, violates the Social Security Act, 42 USC § 601 *et seq.*, the regulations thereunder, and the Due Process Clause;

(e) Enter preliminary and permanent Injunctions enjoining the Defendant, his officers, agents, employees and persons in active concert or participation with him from denying all reasonable expenses, including excess child care costs, as actual expenses of employment, and from failing to inform applicants and recipients of their rights to deduct such expenses and to obtain an administrative hearing.

(f) Allow Plaintiff-Intervenor her costs and reasonable attorney's fees and grant her and all persons similarly situated such additional or alternative relief as may seem to this Court to be just and equitable.

DATED: February 13, 1981

WILLIAM BURNHAM (P23286)
Attorney for Plaintiff-Intervenor
Wayne State University Law School
468 W. Ferry
Detroit, MI 48202
313-577-4827 or 3928

EDWARD HOORT (P25561)
Attorney for Plaintiff-Intervenor
Michigan Legal Services
900 Michigan Building
220 Bagley Avenue
Detroit, MI 48226

Student Attorney:

JANE WILLIAMS
Wayne State University Law School
Clinical Program
468 W. Ferry
Detroit, MI 48202

PLAINTIFF-INTERVENOR EXHIBIT G
STATE OF MICHIGAN

WILLIAM G. MILLIKEN, GOVERNOR
DEPARTMENT OF SOCIAL SERVICES
300 South Capitol Avenue
P.O. Box 30037
Lansing, Michigan 48909
JOHN T. DEMPSEY, Director

May 29, 1980

Ira Goldstein, Director
Office of Policy
Trans Point Building, Room B428
2100 Second Street, S. W.
Washington, D. C. 20024

Dear Mr. Goldstein:

I am writing in reference to an issue which is of critical importance to both cost and efficient administration of the AFDC program in Michigan as well as other states.

The Michigan Welfare Rights Organization recently filed suit against the Michigan Department of Social Services in Federal District Court on behalf of an AFDC recipient, Gail Blessing. The suit alleges that the department has failed to allow employed AFDC recipients to deduct actual costs of day care as an expense of employment from earned income in determining the amount of assistance. The plaintiffs contend through the suit that the department may not establish reasonable limitations for expenses atributable to earning income. A copy of the case is attached.

The crux of the issue is whether states can manage their finite fiscal resources in order to insure both efficient administration of the AFDC program and that a reasonable amount of assistance is granted to as many eligible recipients as possible. To hold that a state may not estab-

lish and maintain reasonable ceilings invites abuse through the fact that providers will be encouraged to request whatever rate they wish since the department is not able to maintain control of the rate structure. While rates paid by non-AFDC recipients may be negotiated between the provider and the payor, the department may be forced to pay above the going rate because of the lack of ability to negotiate or establish a reasonable rate structure.

Another obvious result of a decision that the state may not maintain a reasonable rate structure will be unlimited caseload expansion through reduction of the amount of budgetable income.

In addition, many cases will be eligible for assistance for a longer period of time than otherwise necessary if it is not possible to establish some reasonable ceilings on expenses of employment. I'm sure you realize that fiscal resources, at both federal and state levels, are not unlimited and that some governmental units must operate within the limitation of appropriated funds. While it is not the purpose of reasonably established standards to work as a screening mechanism for potentially eligible recipients neither should significant numbers of persons become eligible for assistance as a result of artificially inflated payment rates. A reasonable approach would seem to be that if employed recipients negotiate for a higher standard of service than is standard for the community or paid by non-recipients, that a portion of the earned income disregard could be used for this purpose.

The logical conclusion to a decision that the department may not utilize a reasonable rate structure will be that there can, in fact, be no limitation on any expenses claimed by employed recipients. In this position, the department would be without the legal ability to place limitations on expenses for automobile payments, repair bills, insurance premiums, or any item which is claimed as even remotely related to employment.

I believe that the establishment and maintenance of reasonable rate structure is an established and necessary principle of efficient government operation. Such a mechanism is the only real tool available to state agencies to manage their fiscal resources. I am pleased to note congressional intent in this area through the establishment of a flat percentage for expenses of employment which is included in House Bill 3434. We simply cannot provide for unlimited deductions in a time of limited resources. Therefore, it is our intent to establish a maximum deduction for day care as an expense of employment.

I urge you to consider this matter thoroughly and request your support for the establishment of a reasonable maximum for employment deductions. It is especially important in light of strained fiscal resources at both the federal and state levels of government, and the intent of Congress in developing welfare reform legislation.

Sincerely,

/s/ John T. Dempsey
JOHN T. DEMPSEY

attachment

PLAINTIFF-INTERVENOR EXHIBIT H

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Dr. John T. Dempsey
Director
Department of Social Services
300 South Capitol Avenue
P.O. Box 30037
Lansing, Michigan 48909

Dec. 15, 1980

Dear Dr. Dempsey:

I am responding to your May 29, 1980 letter in which you inquire as to whether a State may establish maximum deductions for work related expenses, including child care.

Placing arbitrary maximums on allowable work expenses is contrary to the Social Security Act (section 402(a)(7) and (8)) and the Supreme Court ruling in *Shea* v. *Vialnando*, 416, U.S. 251 (1974). Although standardized amounts for work expenses may be established by State agencies, the State must allow individualized expenses when an applicant or recipient can document that he or she has reasonable expenses related to employment that exceed that standard.

However, reimbursement for specific work expenses which exceed the State standard can be limited on a case by case basis using criteria such as the availability, suitability and prevailing costs of alternative services in the community.

I hope this information is helpful to you in resolving Michigan's child care issue.

Sincerely,

IRA GOLDSTEIN
Acting Associate Commissioner
for Family Assistance

cc: Regional Commissioner, Chicago

| | |
|---|---|
| Goldstein | Henderson |
| Ohki | Central File |
| Kelly | SFY1/SSA/OFA/DPO/Henderson/deMaar |
| deMaar | rvw/8/18/80 |
| Peiper | SFY1/SSA/OFA/DPO/Henderson/ |
| | rvw/9/25/80 |
| | Revised: rvw/9/29/80 |

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 80-71479

Hon. Robert E. DeMascio

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[Title Omitted in Printing]

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**ORDER GRANTING INTERVENTION**

At a session of said Court held
this 10th day of April, 1981, at
the Federal Court House.

PRESENT: The Honorable Robert E. DeMascio

The matter came on to be heard on Applicant Johnny Green's Motion to Intervene, briefs having been filed and oral arguments heard at a hearing held on March 30, 1981 and the Court being duly advised in the premises;

IT IS ORDERED that the Motion to Intervene is hereby granted, the proposed Intervenor Complaint attached to the Motion to Intervene shall be deemed filed, and Defendant shall have 20 days from the date of this order to file a responsive pleading.

IT IS FURTHER ORDERED that the caption of this suit shall be amended in conformity with this Order.

/s/ Robert E. DeMascio
HONORABLE ROBERT E. DEMASCIO
U.S. District Court Judge

Approved as to form:

/s/ Robert Rosenberg
ROBERT ROSENBERG (P23162)

/s/ Edward J. Hoort
EDWARD J. HOORT (P25561)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

---

No. 80-71479

Hon. Robert E. DeMascio

[Title Omitted in Printing]

---

**ORDER DENYING DISMISSAL**

At a session of said Court held
this 10th day of April, 1981, at
the Federal Court House.

PRESENT: The Honorable Robert E. DeMascio

This matter having come on to be heard on Defendants Motion to Dismiss, and briefs having been filed and a oral argument heard on March 30, 1981 and the Court being fully advised in the premises;

IT IS HEREBY ORDERED that, pursuant to the stipulation of the parties, Counts I and III of Plaintiffs Complaint are dismissed as to Gail Blessing only, as they are moot.

IT IS FURTHER ORDERED that as to all other respects, Defendants Motion to Dismiss is denied.

/s/ Robert E. DeMascio
HONORABLE ROBERT E. DEMASCIO
U.S. District Court Judge

Approved as to form:

/s/ Robert Rosenberg
ROBERT ROSENBERG (P23162)

/s/ Edward J. Hoort
EDWARD J. HOORT (P25561)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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New Case No. 80-60017
Old Case No. 80-71479

Hon. Charles W. Joiner

[Title Omitted in Printing]

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**DECLARATION OF JOHNNY GREEN IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Johnny Green declares the following to be true:

1. I am the Plaintiff-Intervenor in the above-entitled case and I am submitting this declaration in support of the Motion for Summary Judgment.

2. In March, 1979, I was living in Ypsilanti, Michigan, with my son, Tyree, born October 27, 1977, and was a recipient of Aid to Dependent Children benefits (hereafter ADC), case number K8148787A, through the Washtenaw County Office of the Michigan Department of Social Services. My getting ADC was based on the fact that the father of my child was not in the home and was not otherwise supporting the child.

3. In March, 1979, I got a job through the Washtenaw County Employment and Training Program to work at Legal Services of Southeastern Michigan, Ann Arbor, Michigan. My pay there was approximately $333.00 (gross) every two weeks for which I worked 40 hours per week. I worked at Legal Services up until May 1, 1981 when the 18-month period of eligibility for public service employment expired.

4. Legal Services of Southeastern Michigan is located at 420 N. Fourth Avenue in Ann Arbor and was about 10 miles from my home in Ypsilanti. I drove my car to

work every day until it broke down. Then I took the bus which cost me about $7.50 per week.

5. Because of my job, I had to make arrangements for care of Tyree while I was at work. Adding the time for dropping him off and picking him up, I needed approximately 42.5 hours of child care per week.

6. I was told by my caseworker at the Department of Social Services (hereafter DSS or the Department) that I would be eligible to have the Department pay for child care while I worked but told me about the limits on the amount of payment.

7. For approximately the first year that I worked, I was able to place my child at centers that accepted the payment by DSS as full payment for the child care. Two of these centers were Little Country Schoolhouse and Sunshine Learning Center in Ypsilanti, both of which eventually closed.

8. Sunshine Learning Center closed in October of 1980 and I then had to find another place for my child while I was at work. I looked at a number of different places trying to find a center which was certified to receive DSS child care payments, but which would care for my child within the $35.00 per week maximum that would be paid by the Department. All the places I went to that accepted DSS payments for child care also charged the parent an additional amount to make up the difference between the DSS maximum payment and the actual full charge for the day care.

9. The place I finally decided to place my child at, Humpty-Dumpty Day Care Center, 1212 Washtenaw, Ypsilanti, Michigan, was no exception. Humpty-Dumpty accepted the maximum DSS payment of $35.00 per week and then charged me an additional $15.00 per week which I had to pay if I wanted to keep my child there. Because I had no other way to care for my child while at work and could not find any suitable care for any less, I had to agree to this arrangement. I placed Tyree there in

November, 1980 and paid $39.00 directly to Humpty-Dumpty for the month of November.

10. That same month, I learned from an attorney that the Department was required to allow working ADC recipients to deduct from their earned income the amount they paid for necessary child care. So, when I filled out my monthly income report for November, I claimed the $39.00 as a work expense deduction in addition to the other deductions I was already allowed.

11. My caseworker told me orally that my request for deduction of child care expenses would not be allowed because Department policy did not authorize any child care deductions. I asked her to put the denial in writing and received a letter shortly, dated December 19, 1980, which stated "[b]abysitting is not an allowable deduction of work expenses." A true copy of this letter is attached to this Declaration as Exhibit A (1 page). This is the only notice of the denial that I received.

12. After this, I continued to work, with Humpty-Dumpty taking care of my child while I was at work, and I continued to have to pay approximately $15.00 per week to Humpty-Dumpty over and above the amount Humpty-Dumpty received from the Department. This went on until May 2, 1981, when I was laid off at Legal Services of Southeastern Michigan because my public service employment eligibility expired.

13. The following is a true and accurate account of the dates and amounts which I paid to Humpty-Dumpty:

| | |
|---|---|
| 11/26/80 | $ 39.00 |
| 12/12/80 | 45.00 |
| 1/15/81 | 50.00 |
| 2/17/81 | 50.00 |
| 3/16/81 | 83.00 |
| 3/26/81 | 46.00 |
| 4/15/81 | 30.00 |
| 5/ 7/81 | 31.00 |
| | $374.00 |

Copies of receipts and money order stubs for the above payments are attached to this Declaration as Group Exhibit B (8 pp.) Some of the receipts reflect payment by me directly to Judy Gowley, owner-operator of Humpty-Dumpty. Some of them, however, indicate payment by Morrell Cooper to the Center. These are accompanied by a receipt indicating that I paid Morrell Cooper the money so he could pay Humpty-Dumpty for me.

14. At no time while I was working was I informed orally or in writing by any DSS employee that the expenses of child care could be allowed as a deduction. They never informed of my right to a hearing following denial of my request for the deduction in December, 1980.

15. I understand that the federal law on child care deductions for ADC recipients has changed effective October 1, 1981 and that ADC applicants or receipients are now allowed to claim child care deductions up to $160.00 per month per child. I wish to continue this lawsuit to get a determination by this Court that the old policy did not allow any child care deduction violated my rights under the federal law before October 1, 1981. In the event of such determination in my favor, I would then request a state administrative hearing to obtain the retroactive benefits to which I believe I am entitled. Also, if this Court decides the policy was illegal, I wish to have notices sent out to other ADC recipients who worked before October 1, 1981 telling them of the illegal policy and advising them about requesting hearings to determine if they were denied benefits and, if so, how much.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 26, 1982.

/s/ Johnny Green
JOHNNY GREEN
Plaintiff-Intervenor

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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No. 80-60017

Hon. Charles W. Joiner

[Title Omitted in Printing]

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**ANSWER TO INTERVENOR COMPLAINT**

NOW COMES Defendant John T. Dempsey, by and through Frank J. Kelley, Attorney General of the State of Michigan and the undersigned assistant attorney general, and answering Intervenor's Complaint for Declaratory, Injunctive and other Relief says as follows:

1. Defendant is not required to respond to Plaintiffs' legal conclusions and statements of intent contained in the preliminary statement, however, to the extent any facts are stated therein they are denied.

2. Defendant is not required to respond to Plaintiffs' statement of intent relative to the scope of his lawsuit.

3(a). Defendant denies that an actual controversy exists which gives rise to a cause of action for declaratory relief under 28 U.S.C. 2201 and 2202 or Fed. R. Civ. P. Rule 57.

3(b). Defendant denies that this action is authorized under 42 U.S.C. 1983 as the claims for relief asserted herein are moot.

4. Defendant denies that the subject matter jurisdiction of this Court has been properly invoked and in support of said denial affirmatively states that as this action has been rendered moot by the change in federal law this Court should dismiss this cause for lack of jurisdiction. (See Motion to Dismiss and Supporting brief filed January 29, 1982.)

5. Defendant denies that Intervenor-Plaintiff Johnnie Green is authorized to bring this action individually or on behalf of the alleged class for the reasons stated in this Court's Memorandum and Order of January 9, 1981 denying class certification and those further stated in Defendant's Motion to Dismiss filed January 29, 1982.

6. Defendant denies that the Fed. R. Civ. P. 23 prerequisites for class certification have been met by Intervenor-Plaintiff and in support of said denial assert the reasons set out in Defendant's brief in support of his motion to dismiss filed January 29, 1982 including the fact that Johnnie Green neither has claims typical of the class nor can she be an adequate representative. Furthermore the case has been moot since October 1, 1981.

7. Defendant denies that Intervenor-Plaintiff has requested a deduction from earned income in determination of her *current* ADC grant as Intervenor-Plaintiff has reported no earned income to the Wayne County Department of Social Services where she has been receiving ADC since January, 1982. In fact, the last time Intervenor-Plaintiff was on ADC was in August, 1981.

8. Defendant admits the allegations contained in paragraph 8.

9. Defendant admits the allegations contained in paragraph 9, to the extent the provisions of the Social Security Act and regulation is mandatory in nature and does not leave any discretion to the State. Further answering said paragraph, this Defendant affirmatively states that:

MCLA 400.10 designates the Michigan Department of Social Services as the state agency to cooperate with the federal government in the administration of the Social Security Act, Title VI. In compliance with 45 C.F.R. 201.2, as a condition to the receipt of Federal funds under Title IV, the Michigan Department of Social Services has submitted a *State Plan* for the administration of Title IV-A—Financial Assistance—Aid to Families with Dependent Children. The State Plan as submitted

to the Department of Health, Education and Welfare has been approved and certified as being in compliance with federal statutes and regulations, by the Department of Health, Education and Welfare.

10. Defendant denies the allegations contained in this paragraph as the Social Security Act, as amended by P.L. 97-35, the Omnibus Reconciliation Act, at 42 U.S.C. § 602(a)(7) does not contain such requirement. Further effective October 1, 1981, 42 U.S.C. § 602(a)(8) set maximum limitations on the amount of deductions from earned income for work related expenses and child care expenses.

11. Defendant denies the allegations contained in this paragraph as the cited regulations have been superceded by amended regulations also effective October 1, 1981, consistent with the amended 42 U.S.C. § 602(a)(8).

12. Defendant admits that his actions are and have been in conformity with 45 C.F.R. 206(a)(1)(i) and 206.10(a)(4) which are set out in their entirety below:

45 C.F.R. 206(a)(2)(i): "Applicants shall be informed about the eligibility requirements and their rights and obligations under the program. Under this requirement individuals are given information in written form, and orally as appropriate, about coverage, conditions of eligibility, scope of the program and related services available and the rights and responsibilities of applicants for and recipients of assistance. Specifically developed bulletins and pamphlets explaining the rules regarding eligibility and appeals in simple, understandable terms are publicized and available in quantity."

45 C.F.R. 206.10(a)(4): "Adequate notice shall be sent to applicants and recipients to indicate that assistance, including supplemental payments, has been authorized (including the amount of financial assistance) or that it has been denied or terminated. Under this requirement, adequate notice means a written notice that contains a statement that action taken, and the reasons for and specific regulations support such action, and an explanation of the individual's right to request a hearing."

Further answering said paragraph, this Defendant states that the regulations cited above delineate requirements for State plans under Title IV-A of the Social Security Act. It is the department's position that this requirement mandates that information be provided regarding components of the AFDC program and the rights and responsibilities of applicants and recipients in relation to those components.

This position is also derived in part from another provision of federal regulations (45 C.F.R. 205.10(a)(3)). This subsection obligates the department to provide written notice of a right to a hearing "at the time of application and at the time of any action affecting his claim." A claim for assistance is affected only by a proposed change or reduction in one or more of the standard allowances in the approved state plan.

45 C.F.R. 206.10(a)(7) states "In cases of proposed action to terminate, discontinue, suspend, or reduce assistance, the agency shall give timely and adequate notice. Such notice shall comply with the provisions of 205.10 of this chapter." Such actions are not proposed in relation to benefits not included as part of the approved State standard of assistance.

13. Defendant admits those allegations as are consistent with § 402(a)(1) of the Social Security Act and 46 C.F.R. § 205.120 (1979) and denies those that are inconsistent therewith.

14. Defendant denies that the allegations contained in this paragraph reflect the current policy of DSS as contained in Assistance Payments Manual Item 331 (revised effective October 1, 1981). Defendants attach that policy in response to the allegations contained herein.

15. Defendant admits that his Department administers the Title XX program in Michigan and denies that after October 1, 1981 day care benefits were paid under this program to employed recipients of ADC as expenses for day care, on and after said date, were allowed as an

earned income disregard for employed ADC recipients up to federally imposed maximums.

16. As Intervenor-Plaintiff has omitted a paragraph 16 in her Complaint, no answer is required.

17. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in said paragraph and leave Plaintiffs to their proofs. Further answering said paragraph, Defendant states that the Department is under no obligation to provide applicants for or recipients of assistance with a determination of eligibility for payment in excess of the state AFDC standards. All determinations for applicants and only negative case determinations for recipients, based on approved state standards, require notices of the proposed action and the right of a client to an administrative hearing. Therefore, as the method used by the Department in meeting day care costs of employed AFDC recipients was within the State's approved plan for Title XX prior to October 6, 1981 the AP worker was under no obligation to send notice to the recipient regarding non-payment of child care in excess of the Department's child care payment.

18. Defendant denies the allegations contained in paragraph 18 as any person deemed entitled to a child care deduction by an administrative law judge, after hearing, is determined to be so entitled in accordance with Department policy not in contravention thereof.

19. Defendant denies the allegations contained in paragraph 19 as Intervenor-Plaintiff Johnnie Green actually resides in Detroit, Michigan (not Ypsilanti). Further, her ADC case was closed, due to her receipt of excess income, on August 11, 1981 and was not opened again until January 1, 1982 due to absence from the home of her child's father.

20. Defendant admits that Ms. Green began working in Ann Arbor, Michigan in November, 1979 and was receiving $333.00 every two weeks. Defendant denies that she has continued to work in Ann Arbor up to the

present as she apparently left Ann Arbor in August, 1981 and DSS records in Wayne County where she presently resides show her to be unemployed.

21. Defendant denies that Intervenor-Plaintiff has incurred work related costs described in this paragraph since August, 1981 up to the date this answer is filed.

22. Defendant denies that Intervenor-Plaintiff has incurred child care expenses because of employment since August, 1981.

23. Defendant denies that day care is unavailable to Intervenor-Plaintiff, if it was required, at $35.00 per week in Detroit where she presently resides.

24. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained herein and leaves Intervenor-Plaintiff to her proofs except as to the receipt attached as Exhibit A which Defendant presumes at this time based on current information to be genuine.

25. Defendant admits the genuineness of the 12/19/80 handwritten letter of Ms. N. Drouillard to Ms. Green attached as Exhibit B to the Complaint and believes the copies of a receipt and money order to be genuine (Exhibits C & D). However, as to the remaining allegations made in said paragraph, Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity thereof. Further these facts, even if true, do not reflect Ms. Green's current circumstances.

26. Defendant lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations made in this paragraph and leaves Intervenor-Plaintiff to her proofs.

27. Defendant denies the allegations made in this paragraph as same are untrue except that legal services *did* correspond with HEW (now HHS) and that the letters attached as Exhibits E and F to Intervenor's Complaint were received by Defendant and speak for themselves.

28. Defendant admits that his May 29, 1980 letter (Exhibit G) and Ira Goldstein's response dated December

15, 1980 are genuine copies. As such the documents speak for themselves.

29. Defendant denies violating 42 U.S.C. 602(a)(7) as it existed prior to October 1, 1981 and regulations promulgated thereunder. Further effective October 1, 1981 this claim has been mooted out by the amendments in P.L. 97-35 §§ 2301 and 2302 to 42 U.S.C. 602(a)(7) and 602(a)(8).

30. Defendant denies that its policies were prior to October 1, 1981 or are currently contrary to 45 C.F.R. § 206.10(a)(2)(i) and (a)(4), 45 C.F.R. § 205.10(2)(3) or the Due Process Clause of the U.S. Constitution, Amendment XIV.

31. Defendant denies that Assistance Payments Manual Item 331 when read in conjunction with Social Services policy as contained in the Services Manual are inconsistent with providing equal protection of the law as it is rational to classify those persons eligible for AFDC benefits based on actual need for same. Further, after October 1, 1981, the alleged classification complained of ceased to exist as all expenses of employment up to the federal maximum were allowed to be taken as an earned income disregard.

32. Defendant denies the allegations contained in this paragraph as they are untrue because DSS has always administered the AFDC program on a statewide basis with equitable standards of assistance and administration that are mandatory throughout the state.

33. Defendant denies that either Intervenor-Plaintiff or the class she seeks to represent are currently being harmed in any fashion which would require any relief from this Court.

WHEREFORE, Defendant prays that this Honorable Court:

A. Dismiss the above-captioned cause for lack of subject matter jurisdiction, or

B. Dismiss the claims of Intervenor-Plaintiff as they are moot, and

C. Again deny class certification in this matter, and

D. Deny any and all relief requested by Intervenor-Plaintiff both of a declaratory and injunctive nature as well as Intervenor-Plaintiff's claimed costs and attorneys.

E. Afford Defendant his costs, attorneys fees and such other or further relief as is just and equitable.

FRANK J. KELLEY
Attorney General

JANIS MEIJA
Assistant Attorney General

/s/ Robert N. Rosenberg
ROBERT N. ROSENBERG
Assistant Attorney General
512 Commerce Center
Lansing, Michigan 48913
Phone: (517) 373-7700

Dated: February 3, 1982
mp/27/mwora

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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Civil Action No. 80-60117

HON. CHARLES W. JOINER

[Title Omitted in Printing]

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**MEMORANDUM OPINION AND ORDER**

Before the court are plaintiffs' motions for summary judgment and class certification, and defendant's motion to dismiss.

On April 11, 1980 plaintiffs, Michigan Welfare Rights Organization and Gail Belssing, filed a complaint seeking declaratory and injunctive relief against John Dempsey, the Director of the Michigan Department of Social Services (MDSS). By stipulation of the parties, the claims of the only individual defendant, Blessing, were rendered moot as to the key counts in the complaint. However, an intervening plaintiff, Johnny Green, filed her complaint on February 18, 1981, and intervention was granted on April 10, 1981. The intervenor's complaint asserted an additional basis for recover beyond those claimed in the original complaint.

Plaintiffs alleged that defendant was depriving them benefits to which they were entitled under Title IV-A of the Social Security Act (the Act), 42 U.S.C. §§ 601-615, in violation of 42 U.S.C. § 1983. *See also* 45 C.F.R. §§ 233.20(a)(6)(iv) and (7)(i). This alleged deprivation was asserted to be the result of defendant's wrongful refusal to deduct from plaintiffs' income the costs of child care necessitated by working mothers' need to be at their place of employment. Plaintiffs also alleged that

defendant failed to properly inform them of their rights to claim work expenses above the standard amount and of their right to request an administrative hearing to challenge defendant's denial of benefits. *See* 45 C.F.R. §§ 205.10(a)(3), 206.10(a)(2)(i) and (a)(4). Finally, plaintiffs claimed that defendant used disparate policies throughout the state and therefore violated the requirement that all state plans under the Act must operate on a statewide basis with equitable standards of assistance and administration that are mandatory throughout the state. *See* 42 U.S.C. §§ 602(a)(1) and (3), and 45 C.F.R. § 205.120.

The Act under scrutiny, commonly known as Aid to Families with Dependent Children (AFDC), is designed to assist needy families with children. The Act establishes an elaborate mechanism for state participation in the program. However, the process under inquiry herein, simply stated, requires the states first to apply federal guidelines to establish a family's need and then compare that need determination to the amount of income determined to be available to a family eligible for assistance under the program. The difference between the amount of need and the amount of available income provides the basis for establishing the amount of cash assistance to which the family will be entitled under the program. Of course, under this method of calculation the amount of income the family is deemed to earn is critical to the ultimate determination of the family's entitlement under the Act.

Both complaints sought recovery for the named plaintiffs and for those similarly situated.

Prior to October 1, 1981, federal law required a state participating in the program to deduct from income or "disregard" all family expenses reasonably attributable to the earning of income. 42 U.S.C. § 602(a)(7). This included child care expenses incurred by a mother when she went to work and paid someone to care for her children. *See also* 45 C.F.R. §§ 233.20(a)(6)(iv) and (7)(i).

Plaintiffs challenged defendant's alleged refusal to deduct from the family incomes of AFDC recipients and applicants the money paid by families for child care. Plaintiffs asserted that MDSS refused to permit child care costs to be considered as an allowable expense of employment in calculating budgetable earned income. Plaintiffs contended that MDSS's refusal to permit recipients to deduct child care costs from family income was based on the Department's erroneous position that it already provided day care services to recipients without cost. While plaintiffs conceded that MDSS had a program of child care service implemented under Title XX of the Social Security Act, 42 U.S.C. § 1397, they alleged, however, that there were significant impediments to AFDC recipients' use of the "free" day care facilities provided by the defendant.

## I. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION TO DISMISS

The legal issue presented to the court is quite narrow. Plaintiffs seek a finding by the court that defendant's refusal to deduct from AFDC's family incomes the costs of child care violated 42 U.S.C. § 602(a)(7). When plaintiffs filed their suit, 42 U.S.C. § 602(a)(7) provided:

> [E]xcept as may be otherwise provided in clause (8), [a state plan for aid and services to needy families with children must] provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children . . . *as well as any expenses reasonably attributable to the earning of any such income*. . . . (Emphasis added).

*See also* 45 C.F.R. §§ 233.20(a)(6)(iv) and (7)(i).

Plaintiffs argue that proper application of the statute required defendant to deduct from the incomes of AFDC

families the reasonable costs of child care. As noted at the outset, there are several other arguments raised by plaintiffs for the proposition that defendant failed to follow the law. However, the principal issue raised by plaintiffs concerns defendant's application of § 602(a)(7).

On August 13, 1981, Congress passed the Omnibus Reconciliation Act, Pub.L. No. 97-35. Among other things, the Act modified the relevant provisions of the Social Security Act under scrutiny in this case. Effective October 1, 1981, 42 U.S.C. §§ 602(a)(8)(a)(ii) and (iii) were amended to provide that the state agency:

> (ii) shall disregard from the earned income of any child or relative applying for or receiving aid to families with dependent children, or of any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $75 of the total of such earned income for such month (or such lesser amount as the Secretary may prescribe in the case of an individual not engaged in full-time employment or not employed throughout the month);
>
> (iii) shall disregard from the earned income of any child, relative, or other individual specified in clause (ii), an amount equal to expenditutes for care in such month for a dependent child, or an incapacitated individual living in the same home as the dependent child, receiving aid to families with dependent children and requiring such care for such month, to the extent that such amount (for each such dependent child or incapacitated individual) does not exceed $160 (or such lesser amount as the Secretary may prescribe in the case of an individual not engaged in full-time employment or not employed throughout the month) . . . .

Because of these amendments to the Act and defendant's compliance with them, plaintiffs concede that their

claim for relief, if valid at all, relates only to benefits prior to October 1, 1981.

Defendant contends that the case should be dismissed as moot. It asserts that effective October 1, 1981 it changed its policies to be consistent with the amendments to the Act. Accordingly, defendant states that the Eleventh Amendment bars plaintiffs' recovery for retroactive benefits. On the other hand, plaintiffs present arguments to support their contention that defendant violated the pre-October, 1981 law and they assert that the case is not moot as to those pre-October, 1981 claims.

The court has carefully evaluated the motions, briefs, responses, and supplemental briefs of the parties. Since the court finds plaintiffs' claims are moot and barred by the Eleventh Amendment, it need not decide whether or not defendant's pre-October, 1981 interpretation of the Act violated the law as it then existed. None of the plaintiffs claim a right to prospective relief. There is no assertion that the defendant is presently violating the law with respect to child care expenses, and there is no claim that there has been a violation after October 1, 1981.

The court finds plaintiffs claims for pre-October, 1981 benefits are moot. The Eleventh Amendment bars plaintiffs from recovering the relief they seek. Application of the Eleventh Amendment requires the court to dismiss the lawsuit since plaintiffs seek retrospective money damages.

Five years after the Supreme Court's decision in *Chisholm v. Georgia*, 2 Dall. 419 (1793), in which a state was held liable to suit by a citizen of another state or a foreign country, the Eleventh Amendment was adopted and has remained unchanged. It provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The clear intent of the amendment was to reduce jurisdiction and power of federal courts over the states and to smooth the relations between the states and the federal government. Since its passage, the Eleventh Amendment has been applied by courts to hold unconsenting states immune from suits brought in federal courts by citizens. Evolution of the rule has led courts to bar lawsuits by private parties where the liability sought to be established would lead to a pay out from the public treasury. *Edelman v. Jordan*, 415 U.S. 651 (1974).

In a narrow, circumscribed yet important modification of prior Eleventh Amendment analysis, the Supreme Court in *Ex Parte Young*, 209 U.S. 123 (1908), held that the Eleventh Amendment did not bar prospective injunctive relief. In subsequent cases, the Court sanctioned prospective relief even where such relief had an ancillary effect on the state treasury. *See Graham v. Richardson*, 403 U.S. 365 (1971) and *Goldberg v. Kelly*, 397 U.S. 254 (1970). However, in each instance the monetary impact upon the state was merely incidental to prospective relief.

In contrast to *Ex Parte Young* and its progeny, plaintiffs here seek to have the court award relief which is purely retrospective in nature and which is not incidental or ancillary to any prospective relief. Plaintiffs ask the court to grant them something which they are barred from recovering under the Eleventh Amendment. While plaintiffs couch their request for relief in terms of *Quern* type notice relief, the court finds that the request is not ancillary to any valid, awardable prospective relief.

An examination of the well reasoned, relevant trial and appellate cases that have interpreted the impact of *Ex Parte Young* on the Eleventh Amendment, and an application of all of the Supreme Court cases that have undertaken such an analysis, dictates that before this court can award plaintiffs what they seek there must be an award of prospective relief in their favor. Because the Eleventh Amendment forecloses the plaintiffs from an award of money damages as retrospective relief and because by

their own admission they are not entitled to prospective relief, the court finds it is precluded from taking the steps sought by plaintiff to impose monetary retrospective relief. *Quern v. Jordan*, 440 U.S. 332 (1979).

Accordingly, plaintiffs' motion for summary judgment is denied and defendant's motion to dismiss is granted.

## II. PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

In view of the court's ruling on plaintiffs' motion for summary judgment and defendant's motion to dismiss, plaintiffs' motion for class certification is moot and is, therefore, denied.

/s/ Charles W. Joiner
CHARLES W. JOINER
United States District Judge

Dated: June 22, 1982
Ann Arbor, Michigan

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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Civil Action No. 80-60117

HON. CHARLES W. JOINER

[Title Omitted in Printing]

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**JUDGMENT**

The plaintiffs motions for summary judgment and class certification, and defendant's motion to dismiss came on for hearing before the court, Honorable Charles W. Joiner presiding, and the issues having been duly heard and a decision having been duly rendered in a Memorandum Opinion and Order dated June 22, 1982,

It is Ordered and Adjudged that the plaintiffs take nothing, and that the action be dismiss on the merits, with prejudice.

ROBERT A. MOSSING

/s/ Sharon M. Bailey
Clerk of the Court

CWJ

Dated: June 22, 1982
Ann Arbor, Michigan

## III. ORAL ARGUMENT TRANSCRIPT REFERENCES

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### STEPPARENT CARE TRANSCRIPT (4/13/82)

* * * *

[17] So, it's quite clear, even as late as September 21st, 1981, when those regulations came out and the final version came out in January and repeated that statement, that in the view of HHS, the defendant has not had, at any point, law of general applicability sufficient to base an assumption of income on, and, of course, that is the precise issue in this case, whether or not the State law which allegedly required support is one which is of general applicability which is co-extensive with that required of natural parents.

On the matter or relief, plaintiffs would point out that from the very beginning in their complaint, and I am referring to Paragraphs C, D and E in the relief section, Paragraph C, plaintiff requested declaratory judgment, saying that defendant's policy implemented in March is illegal, and in Paragraph D, we asked for an injunction against the enforcement of that policy, and in Paragraph E, we asked for notice relief.

So, from the very beginning, we've asked for the kind of relief we've requested here. Of [18] course, injunctive relief is no longer possible and, of course, plaintiffs can possibly stipulate to the modification of the preliminary injunction, indicating that no prospective injunctive relief would be necessary and that, of course, the injunction which had been entered, should have no prospective effect after October 1st.

As to the other kind of relief, declaratory relief and notice relief, this is the classic example of a case as the Supreme Court indicated in the Camenisch v. University of Texas case, cited in our brief, where some kinds of relief are moot, and other kinds of relief are not moot, and it's plaintiffs' position the declaratory relief requested

in the complaint and notice relief requested in the complaint are not moot at this point.

As to declaratory relief, it's quite clear that for all plaintiffs, all the plaintiffs class, not just the ones that have lost benefits, but the ones that can obtain benefits because they were covered by the preliminary injunction, that this case is not moot.

• • • •

**CHILD CARE CASE TRANSCRIPT (3/9/82)**

• • • •

[12] Basically, there are three claims. One is that the failure to allow that benefit, those deductions, violated the Social Security Act; the second claim being that failure to notify the recipient of ADC to be informed of their rights to claim actual work expenses as set forth by Reimer v. Hooker, cited in the brief and third being, defendant set up a system of dual policy whereby the deduction was allowed for persons, certain persons who asked for administrative hearings; was not allowed for other persons who asked for administrative hearings and was not allowed to persons that just came into the office and did not appeal the determination.

It's the claim of the plaintiffs, essentially, the defendant, acting under color of State law, had deprived plaintiffs and the class of federal rights.

THE COURT: What do you want me to do?

MR. BURNHAM: I would ask you to enter summary judgment in favor of the plaintiff Johnny Green and the class which has been proposed.

THE COURT: And what happens, then, if I did that?

[13] MR. BURNHAM: At that point, then, we will also ask that the Court provide the order—order the notices which was allowed in Quern v. Jordan be provided to members of the class; that they might—

THE COURT: But there was a difference in that case, wasn't there? Well I don't care to press that now, but that's the only relief you want?

MR. BURNHAM: At this point, yes, your Honor. In other words, declaratory relief that in fact the practices and policies violated Federal law and a declaratory judgment for Johnny Green, individually, who is the current plaintiff intervenor, who has—

THE COURT: What would she get?

MR. BURNHAM: She would $374.00 by going to the administrative hearing which would be retroactive benefits—

THE COURT: Who are the members of the class?

MR. BURNHAM: All persons who had work expense during the time period defendant had a policy which was in violation of Section 602(a)(7), who was not allowed to deduct child care expense because of the illegal policy up to October 1st when [14] the Act became law.

THE COURT: Is there a limitation period?

MR. BURNHAM: The latest period October 1, 1981. In terms of the earlier limitation period, it's not clear to me exactly when the defendant's policy changed. On many of these issues, the defendant's policy never said, one way or the other, whether or not benefit—whether or not child care deductions were allowed. That was read by some administrative law judges one way and read by others a different way. To the extent anyone was not allowed to deduct benefit—child care expense then they should be be allowed to file an administrative claim.

THE COURT: There have been a number of policy changes is the problem.

How far back do we go?

MR. BURNHAM: I would say until—since the Supreme Court's decision, Shea v. Vialpando, in 1974 when it became clear States had to allow actual work expense deductions.

MR. BURNHAM: Since that time, it's become crystal clear what defendant has done violates Federal law.

## IV. STATE RULES & REGULATIONS

### MICHIGAN ADMINISTRATIVE CODE

**R 400.902 Notice of negative action.**

Rule 902. (1) In cases of proposed action to discontinue, terminate, suspend, or reduce public assistance or services, the department shall mail a timely notice before a proposed change would be effective. Timely means that the notice is mailed at least 10 days before the action would become effective. A notice shall include the following:

(a) A statement of what action the department intends to take.

(b) The reasons for the intended action.

(c) The specific regulations supporting the action.

(d) An explanation of the individual's right to request a hearing.

(e) The circumstances under which assistance or service is continued if a hearing is requested.

(2) An agency may dispense with timely notice as provided in subrule (1), but shall send adequate notice as detailed in subrule (1) not later than the date upon which the action would become effective, when:

(a) An agency has factual information confirming the death of a recipient or of the aid to dependent children payee when there is no relative available to serve as new payee.

(b) An agency receives a clear written statement signed by a recipient that he no longer wishes assistance, or that gives information which requires termination or reduction of assistance, and the recipient has indicated, in writing, that he understands that this shall be the consequence of supplying such information.

(c) A recipient has been admitted or committed to an institution, and further payments to that individual do

not qualify for federal financial participation under the state plan.

(d) A recipient has been placed in skilled nursing care, intermediate care, or long-term hospitalization.

(e) A recipient's whereabouts are unknown and agency mail directed to him has been returned by the post office, indicating no known forwarding address. A recipient's check shall be made available to him if his whereabouts become known during the payment period covered by a returned check.

(f) A recipient has been accepted for assistance in a new jurisdiction and that fact has been established by the state department.

(g) An aid to dependent children child is removed from the home as a result of a judicial determination.

(h) A change in level of medical care under the medical assistance program is prescribed by the recipient patient's physician.

(i) A special allowance granted for a specific period is terminated and the recipient has been informed in writing at the time of initiation that the allowance automatically terminates at the end of the specified period.

(3) When the changes in either state or federal law require automatic grant adjustments for classes of recipients, timely notice of the grant adjustments shall be given which is adequate if it includes a statement of the intended action, the reasons for the intended action, a statement of the specific change in law requiring the action, and a statement of the circumstances under which a hearing may be obtained and assistance continued.

**R 400.903 Right to hearing.**

Rule 903. (1) An opportunity for a hearing shall be granted to an applicant who requests a hearing because his claim for assistance is denied or is not acted upon with reasonable promptness, and to any recipient who is aggrieved by an agency action resulting in suspension, reduction, discontinuance, or termination of assistance.

(2) An opportunity for a hearing shall be granted to an applicant who requests a hearing because of a denial, suspension, or exclusion from a service program or failure to take into account a recipient's choice of service.

(3) A hearing shall not be granted when either state or federal law requires automatic adjustments for classes of recipients, unless the reason for an individual appeal is incorrect grant computation.

(4) An applicant for, or holder of, a license issued by the department is entitled to a hearing based upon the denial, limitation, refusal to renew, or revocation of a license.

(5) A complaint as to alleged misconduct or mistreatment by a state employee shall not be considered through the administrative hearing process, but shall be referred to the department personnel director.

**R 400.904. Request for hearing; timeliness.**

Rule 904. (1) A request for a hearing shall be in writing and signed by the claimant, petitioner, or on his behalf by his authorized representative.

(2) The request may be filed with the state department office in Lansing or a local county office. When filed with the local county department office, it shall be forwarded immediately to the state department office.

(3) Freedom to make a request for a hearing shall not be limited or interfered with in any way. The agency shall assist a claimant to submit and process his request.

(4) A claimant shall be provided 90 days from the mailing of the notice in R 400.902 to request a hearing.

(5) When a claimant requests a hearing within the timely notice period, assistance shall not be suspended, reduced, discontinued, or terminated until a decision is rendered after a hearing, unless:

(a) A determination is made at the hearing by the administrative law judge that the sole issue is one of state or federal law or policy. The administrative law judge shall inform a claimant promptly in writing that

assistance is to be discontinued pending the final decision if the sole issue is one of state or federal law or policy, subject to this issue being reconsidered in the final decision.

(b) A subsequent change affecting a recipient's grant occurs while the hearing decision is pending and a recipent fails to request a hearing after notice of the subsequent change.

(6) When an appeal is filed from a written notice of revocation, denial, or refusal to renew a license within 30 days of receipt of the written notice, the denial, revocation, or refusal or review shall be held in abeyance pending the final decision.

**R 400.918 Retroactivity.**

Rule 918. When a hearing decision is favorable to the claimant, or when the department decides in favor of the claimant prior to a hearing, the department shall make corrective retroactive payments promptly in accord with federal regulations.

## V. THE SIXTH CIRCUIT'S ORDERS
## COURT OF APPEALS OPINION

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 82-1546

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CAROL BANAS, ET AL., PLAINTIFFS-APPELLANTS

*vs.*

JOHN T. DEMPSEY, DEFENDANT-APPELLEE

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MICHIGAN WELFARE RIGHTS ORGANIZATION, ET AL.,
PLAINTIFFS-APPELLANTS

*vs.*

JOHN T. DEMPSEY, DEFENDANT-APPELLEE

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On Appeal from the United States District Court
for the Eastern District of Michigan

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Decided and Filed August 22, 1984

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Before: LIVELY, Chief Judge; JONES, Circuit Judge;
HOLSCHUH, District Judge.*

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* The Honorable John D. Holschuh, Judge of the United States District Court for the Southern District of Ohio, sitting by designation.

HOLSCHUH, District Judge. In *Quern* v. *Jordan*, 440 U.S. 332 (1979), the Supreme Court held, in a case in which the District Court had enjoined state officials from future violations of federal law under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), that the Eleventh Amendment did not bar the additional relief of an order compelling the state officials to send notices to members of the plaintiff class of welfare recipients informing them of the availability of state administrative procedures to determine their eligibility for lost benefits. This appeal, a consolidation of two actions brought in the Eastern District of Michigan, presents questions involving the doctrine of mootness and, of more significance, the problem of under what circumstances a federal court can order a state official to give a *Quern*-type notice without violating the restrictions placed on Article III jurisdiction by the Eleventh Amendment.[1]

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[1] Plaintiffs in both cases seek remedies primarily under the civil rights statute, 42 U.S.C. § 1983, and the declaratory judgment statutes, 28 U.S.C. §§ 2201-02. Plaintiffs allege jurisdiction of the federal court under both 28 U.S.C. § 1343(3) and 28 U.S.C. § 1331. Although the parties have not questioned the jurisdiction of the federal court, we note that in *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600 (1979), the Supreme Court held that 28 U.S.C. § 1343 does not provide subject-matter jurisdiction to hear a case based solely on a claim that state law conflicts with the Social Security Act, because an alleged violation of the Supremacy Clause "does not, in itself, give rise to a claim 'secured by the Constitution' within the meaning of § 1343(3)," 441 U.S. at 615, and the Social Security Act is not a statute providing for "equal rights" within the meaning of § 1343(3) or "civil rights" within the meaning of 1343(4). 441 U.S. at 617-18.

In the present cases, however, the plaintiffs, in addition to the alleged violations of the Supremacy Clause, the statutory claims, also allege not "wholly insubstantial" federal constitutional (equal protection or due process) claims, which could support the court's exercise of pendent jurisdiction over the statutory claims under 28 U.S.C. § 1343, *Hagans* v. *Lavine*, 415 U.S. 528 (1974), apart from plaintiffs' claim of jurisdiction under 28 U.S.C. § 1331.

I.

Although both cases have given rise to the same important issues, the factual history of each case warrants separate discussion.

A.

Plaintiffs, Michigan Welfare Rights Organization (MWRO) and Gail Blessing, filed a class action complaint on April 11, 1980, seeking relief primarily under 42 U.S.C. § 1983, and challenging certain policies of defendant, the Director of the Michigan Department of Social Services (MDSS), relating to the provision of day care benefits for employed Aid to Families with Dependent Children (AFDC) recipients.

Plaintiffs alleged in count I of their complaint that by wrongfully refusing to deduct from plaintiffs' incomes child care costs necessitated by working parents' needs to be at their places of employment, defendant was depriving them of benefits to which they were entitled under Title IV-A of the Social Security Act in violation of the Supremacy Clause. In count II, plaintiffs asserted that in failing to inform them properly of their rights to claim work expenses above the standard amount and of their right to request an administrative hearing to challenge defendant's denial of benefits, defendant was violating not only federal regulations but also the due process clause of the Fourteenth Amendment. Plaintiffs' third claim for relief alleged a denial of equal protection as a result of the acts alleged in count I.

Plaintiffs sought class certification, a declaratory judgment that defendant's policies and practices violated federal statutory and constitutional provisions, injunctive relief to prevent defendant from continuing to enforce the challenged practices, notification to all class members of their rights to an administrative review under state procedures for lost benefits, and attorney's fees.

Prior to October 1, 1981, federal law required a state participating in AFDC to disregard from earned income

any expenses reasonably atributable to the earning of such income. This included child care expenses incurred by working parents. Plaintiffs asserted that defendant refused to permit child care costs to be considered as an allowable expense of employment in calculating budgetable earned income. Defendant contended that the state could do so because it already provided day care services to recipients without cost.

Effective October 1, 1981, Congress amended the relevant portion of the Social Security Act, 42 U.S.C. § 602 (a), to provide that the state agency shall disregard from earned income expenditures, not exceeding specified amounts, required to be incurred for care of a dependent child,[2] and defendant implemented policies, also effective October 1, 1981, consistent with these amended provisions. On January 29, 1982, plaintiffs moved for summary judgment on the merits of their claim that defendant's prior policies violated pre-October 1, 1981, federal law. They also sought an order against defendant state official requiring the issuance of a notice similar in content to that approved by the Supreme Court in *Quern* v. *Jordan*, 440 U.S. 332 (1979). Defendant, on February 1, 1982, moved to dismiss the action, arguing that the federal law change had rendered the pre-October 1, 1981, claims moot and that the Eleventh Amendment barred any other relief, including an order requiring issuance of a *Quern*-type notice to persons who had lost benefits as a result of defendant's actions.

At the March 9, 1982, hearing on plaintiffs' motions for summary judgment and class certification and defendant's motion to dismiss, plaintiffs made no claim that state law violated the Social Security Act's child care expense provisions after October 1, 1981. Plaintiff's counsel admitted, on the record that plaintiff's claims for declaratory and notice relief, if valid at all, related only to benefits allegedly lost prior to October 1, 1981.

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[2] *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357-933 (1981).

The District Court on June 22, 1982, denied plaintiffs' motions for summary judgment and class certification and granted defendant's motion to dismiss the action. It is from these rulings that plaintiffs in *MWRO* appealed.

B.

On May 11, 1981, Carol Banas and eight other named plaintiffs filed a class action complaint, seeking relief primarily under 42 U.S.C. § 1983, and challenging in count I of their complaint the constitutionality of a section of the Michigan Poor Law, which, along with policies of the defendant Director of the MDSS, required that income of stepparents be considered in determining AFDC eligibility or grant levels for stepchildren under the age of 18 who lived in the same household as the stepparent. Plaintiffs claimed the statute and policies violated the applicable provision of Title IV-A of the Social Security Act and regulations pursuant thereto.

Plaintiffs asserted in count II an equal protection violation as a result of a section of the Michigan Poor Law that allegedly required stepparents to take on a greater responsibility for support of stepchildren eligible for AFDC benefits than was required of stepparents of stepchildren who were not eligible for AFDC benefits. In count III plaintiffs alleged that the Michigan Poor Law impermissibly burdened plaintiff's rights of family privacy and free association by encouraging stepparents to move out of the home or get a divorce if they were already married and by encouraging prospective stepparents not to marry.

Plaintiffs contended in count IV that defendant's policies permitted dependent children and their caretaker relatives, except for stepparents, to deduct from gross earned income all actual expenses of producing that income. State regulations were alleged to require eighty percent of the gross earnings of a stepparent to be automatically counted as available income without allowing for any work expense deductions. Plaintiffs asserted that

this distinction between the incomes of stepparents and other caretaker relatives violated the Social Security Act and federal equal protection guarantees.

Plaintiffs sought class certification, a declaratory judgment that the state statute and defendant's policies and practices violated federal statutory and constitutional provisions, injunctive relief to prevent defendant from continuing to enforce the challenged law and practices, notification to all class members of their rights to an administrative review under state procedures for lost benefits, and attorney's fees.

On May 28, 1981, plaintiffs filed a motion for a preliminary injunction, seeking to enjoin defendant from enforcing the challenged policies and practices regarding stepparents' incomes. The District Court granted plaintiff's motion for a preliminary injunction, which ruling was then appealed to this Court.

Effective October 1, 1981, and before the appeal from the District Court's preliminary injunction could be heard, Congress amended the relevant portion of the Social Security Act, 42 U.S.C. § 602(a), to provide that income of stepparents living in the same household as the child shall be counted for the purposes of determining eligibility and amount of benefits for AFDC.[3] As a result of this change in the law, the parties stipulated to amend the preliminary injunction order, making its prospective effect valid only up to October 1, 1981. The District Court amended the preliminary injunction order to comport with the parties' stipulation, and on October 27, 1981, defendant voluntarily dismissed his appeal of the preliminary injunction order.

Defendant, on March 19, 1982, filed a motion to dismiss the action, arguing that plaintiffs' action was mooted by the amendment to the Social Security Act and that the Eleventh Amendment was a bar to the issuance of any orders sought by plaintiffs. Plaintiffs on April 9,

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[3] *See supra* note 2.

1982, filed their motion for summary judgment, seeking a declaration that the defendant's pre-October 1, 1981, policies violated the Social Security Act's requirements before that date and an order compelling the issuance of a notice similar in content to that approved by the Supreme Court in *Quern* v. *Jordan*, 440 U.S. 332 (1979).

At the hearing conducted on April 13, 1982, plaintiffs admitted that the change in federal law mooted their claims for injunctive relief after October 1, 1981. Nevertheless, plaintiffs did not abandon their motions for class certification and summary judgment.

On June 22, 1982, the District Court issued its Memorandum Opinion and Order denying plaintiffs' motions for summary judgment and class certification and granting defendant's motion to dismiss the action. Plaintiffs appealed this decision jointly with the decision in the *MWRO* case.

II.

The District Court relied on both the mootness doctrine and the Eleventh Amendment in granting defendant's motions to dismiss both the *MWRO* case and the *Banas* case. The District Court concluded that the October 1, 1981, amendments to the Social Security Act rendered plaintiffs' claims moot. Although the District Court did not develop its reasoning concerning the Article III "case or controversy" requirement, it apparently relied upon plaintiffs' admissions that they were not claiming any violation of federal law by defendant after October 1, 1981.

With respect to the request for an order directing the sending of a notice to persons who had lost benefits as a result of defendant's actions, the type of notice discussed in *Quern* v. *Jordan*, 440 U.S. 332 (1979), the District Court concluded that the notice relief authorized by the Supreme Court in *Quern* had to be ancillary to prospective relief already granted. Finding that "plaintiffs have not obtained and could not obtain any prospective relief

upon which to base an ancillary order requiring *Quern* type notice," the District Court held that the Eleventh Amendment barred any order requiring notice to the putative classes in these cases. Finally, the District Court, in light of these rulings, denied the class certification motions as moot.

## III.

The threshold issue presented by these consolidated appeals is whether the change in the law effective October 1, 1981, rendered plaintiffs' actions entirely moot. The mootness doctrine, one facet of the case-or-controversy requirement of Article III, has two separate components. A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest ['personal stake'] in the outcome." *United States Parole Commission* v. *Geraghty*, 445 U.S. 388, 396 (1980), (quoting *Powell* v. *McCormick*, 395 U.S. 486, 496 (1969)).

The primary relief sought by plaintiffs in both cases was an injunction to prevent the defendant Director of the Michigan Department of Social Services from enforcing state practices that allegedly were in violation of plaintiffs' rights under the Fourteenth Amendment and in violation of the Supremacy Clause of the Constitution. It is clear, and plaintiffs' counsel admitted, that the change in federal law that occurred while these actions were pending rendered plaintiffs' requests for such injunctive relief moot.[4] As noted earlier, the parties stipulated to amend the preliminary injunction in *Banas*,

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[4] "Of course, injunctive relief is no longer possible and, of course, plaintiffs can possibly stipulate to the modification of the preliminary injunction, indicating that no prospective injunctive relief would be necessary and that, of course, the injunction which had been entered, [in *Banas*] should have no prospective effect after October 1st." Transcript of hearing held in the District Court April 13, 1982, (Joint Appendix at 190-91).

and it was amended by the court so that it "should have no prospective effect on and after October 1, 1981."[5] Inasmuch as plaintiffs did not contend that defendant's post-October 1, 1981, practices violated any rights of plaintiffs, or that enforcement of defendant's previous policies was "capable of repetition, yet evading review," *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911), a controversy no longer existed regarding defendant's conduct that would have permitted the granting of a *Young* injunction to force the state official to comply with federal constitutional and statutory law.

However, even though plaintiffs' primary claim for relief—an injunction to restrain conduct in violation of federal law—had become moot, it does not necessarily follow that there was no longer a case or controversy sufficient to support federal court jurisdiction under Article III of the Constitution. If, for example, plaintiffs, in addition to their claim for prospective injunctive relief, could also have asserted a claim for damages or restitution as a result of being deprived of welfare benefits, it is clear that such a claim would have saved their actions from the bar of mootness. *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978); *Powell* v. *McCormack*, 395 U.S. 486 (1969); *McKenna* v. *Peekskill Housing Authority*, 647 F.2d 332 (2d Cir. 1981). In apparent recognition that a claim of this nature in the present case would have been barred by the Eleventh Amendment, *Edelman* v. *Jordan*, 415 U.S. 651 (1974), plaintiffs made no such claim. Instead, they sought an order directing defendant to send a *Quern*-type notice to members of the putative classes and, as the predicate for such an order, a declaratory judgment that defendant's prior conduct violated federal law.

Assuming, for the purpose of resolving the threshold question of mootness, that a declaratory judgment could have been the predicate for the issuance of further relief

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[5] Order Amending Preliminary Injunction, Joint Appendix at 46.

in the form of a *Quern*-type order, it seems clear that, with respect to members of the putative class in *MWRO* who lost benefits as a result of defendant's conduct, the issues of whether the District Court should have certified the class, rendered a declaratory judgment that defendant's past conduct in denying plaintiffs' benefits was violative of federal law, and ordered the service of a *Quern*-type notice advising members of the putative class of possible claims under the state's administrative procedure statutes for the recovery of those benefits remained "live." Those who lost benefits to which they allegedly were entitled also had an interest in obtaining a resolution of that issue sufficient to satisfy the "personal stake" requirement.

The *Banas* case presents a more difficult question of whether there was any longer a "case of actual controversy" [6] in view of the fact that the named plaintiffs and many members of that putative class received, as a result of the litigation, the benefits to which they claimed entitlement.[7] The *Banas* plaintiffs who received their benefits nevertheless contend that the issue of whether defendant's past conduct violated federal law was still "live" as to them, and that they and members of the putative class who received the benefits still had a "personal stake" in the outcome, because it was conceivable that defendant would still try to recoup, as overpayments, the benefits paid.[8] Defendant responds by pointing out

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[6] An essential requirement for the ordering of a declaratory judgment, consistent with the jurisdictional requirement of Article III, is that there be "a case of actual controversy." 28 U.S.C. § 2201.

[7] Apparently, many of the persons in *Banas* who received benefits pursuant to the preliminary injunction also were provided voluntarily by defendant retroactive benefits for the period during which benefits had been lost prior to the preliminary injunction.

[8] The *Banas* plaintiffs concede that "[n]otice relief of the type contemplated for plaintiffs who lost benefits would mean little to the group who got benefits." It is argued, nonetheless, that a "different form of notice might still be appropriate," one that would simply

that he not only has never sought to recoup any such benefits but has expressly waived any right to do so. Defendant further contends that, legally, he could not recoup benefits paid under an injunction, even if it were later determined that the injunction had been improvidently granted.

In our view, plaintiffs' assertion that defendant, contrary to his express representations and in light of his stipulation and dismissal of the appeal from the preliminary injunction, would attempt to recoup any benefits paid to the *Banas* plaintiffs or putative class members is purely conjectural. Accordingly, we conclude that, if all named plaintiffs and all putative class members had received benefits owed, there no longer would have remained in the *Banas* case "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941). In such a case, having received the benefits to which they claimed to be entitled after filing their lawsuit, the *Banas* plaintiffs would have been under no threat of further injury as a result of defendant's conduct, *cf. Edgar* v. *MITE Corp.*, 457 U.S. 624 (1982), and, therefore would have lacked that "personal stake in the outcome" required to assure the concrete adverseness necessary for the resolution of constitutional questions. *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).

The record, however, seems clear that not all members of the putative class in *Banas* did in fact receive all the benefits lost as a result of defendant's conduct allegedly in violation of federal law. It appears that during the period from the effective date of defendant's policies, March 1, 1981, to the date the preliminary injunction be-

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inform them that their entitlement to the benefits received under the preliminary injunction had been adjudicated by the federal court, "so that they would know to protest any attempt at recoupment."

came effective, June 1, 1981, some members of the putative class lost benefits as a result of those policies. To the extent that there remained putative class members who allegedly had lost benefits and had not yet been reimbursed, the *Banas* case could not have been considered moot, even though the named plaintiffs themselves no longer had a personal stake in the receipt of any lost benefits. *See United States Parole Commission* v. *Geraghty*, 445 U.S. 388 (1980).[9]

Because we conclude that the complaints in *Banas* and *MWRO* should not have been dismissed, even after the change in federal law effective October 1, 1981, on mootness grounds, we are compelled to reach the Eleventh Amendment issue. Although the existence of the required case or controversy would have enabled the District Court to exercise its jurisdiction under Article III, the exercise of the judicial power conferred by Article III is clearly restricted, in actions brought against state officials, by the Eleventh Amendment.

## IV.

The Eleventh Amendment provides, as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity,

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[9] The Federal Declaratory Judgment Act by its express language makes it clear that a court has certain discretion to grant or withhold declaratory relief. It provides, in pertinent part, that in "a case of actual controversy within its jurisdiction, . . . any court of the United States . . . *may* declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201 (emphasis added). Decisions of the Supreme Court have established the discretionary nature of this remedy. *Zemel* v. *Rusk*, 381 U.S. 1, 19 (1965); *A. L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324 (1961); *Public Service Commission* v. *Wycoff Co.*, 344 U.S. 237, 241 (1952). In the present cases, the District Court dismissed the actions on jurisdictional grounds and not as a result of exercising any discretion in the withholding of declaratory relief.

> commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Despite the limited language of the Amendment, the immunity it provides to the states was extended at an early date to suits brought by a citizen against his or her own state, *Hans* v. *Louisiana*, 134 U.S. 1 (1890), on the reasoning that the Amendment exemplified the broader doctrine of sovereign immunity of the states and that such immunity is a constitutional limitation on the federal judicial power established in Article III of the Constitution. *Pennhurst State School & Hospital* v. *Halderman*, —— U.S. ——, ——, 104 S. Ct. 900, 906, 79 L. Ed. 2d 67, 77 (1984). The jurisdictional bar prevents federal court actions, in the absence of consent, against a state or one of its agencies or departments, *Florida Department of Health* v. *Florida Nursing Home Ass'n*, 450 U.S. 147 (1981); *Alabama* v. *Pugh*, 438 U.S. 781 (1978), and suits against state officials when the state is "the real substantial party in interest," *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459, 464 (1945), regardless of the nature of the relief sought. *Cory* v. *White*, 457 U.S. 85, 91 (1982).

The present cases, brought against defendant in his official capacity as Director of the Michigan Department of Social Services, are effectively actions against the state, and would clearly be barred by the Eleventh Amendment but for the saving grace of *Ex parte Young*, 209 U.S. 123 (1908).[10] Because *Young* created an "ex-

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[10] The Eleventh Amendment does not bar actions for money damages arising from constitutional torts committed by state officials who are then sued in their individual capacities in federal court. Such actions, seeking to impose personal liability on the individual defendants, are not considered to be actions against the state. *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). In the cases on appeal, although brought against defendant "individually and in his official capacity as Director of Michigan Department of Social Services," it is clear that the only claims asserted against him are in his offi-

ception" to the sovereign immunity bar to actions against the state, permitting the present actions to be filed, it is the rationale of the *Young* doctrine that provides the basis for determining the type of relief that can now be granted in these cases. This requires a brief review of that landmark decision and the later narrowing of its reach by subsequent decisions of the Supreme Court.

A.

In *Young*, the Court held that the Eleventh Amendment does not bar an action in federal court to enjoin a state official from enforcing a state statute that allegedly violates the Fourteenth Amendment. In what the Court has since recognized as a "fiction," [11] the *Young* Court held that an unconstitutional enactment is "void" and thereby does not "impart to the state official any immunity from responsibility to the supreme authority of the United States." *Young*, 209 U S. at 160. Because the state could not authorize an unconstitutional action, the state official was "stripped of his official or representative character and [was] subjected to the consequences of his official conduct." *Id.*[12] If the state official were truly stripped of his official or representative character and subjected to the consequences of his official conduct, then no limitation would exist on the type of relief that could be granted. The Court, however, has never so held.

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cial capacity as the state official charged with enforcement of state law and policies allegedly in violation of federal law, and the only relief sought is declaratory, injunctive and notice relief.

[11] *Pennhurst State School & Hosp.* v. *Halderman*, —— U.S. at ——, 104 S. Ct. at 911, 79 L. Ed. 2d at 82.

[12] The "well-recognized irony" of *Young* is that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not state action under the Eleventh Amendment. *Florida Department of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 685 (1982) (Stevens, J., plurality opinion).

In *Edelman* v. *Jordan*, 415 U.S. 651 (1974), plaintiff filed a class action seeking declaratory and injunctive relief against state officials who were administering the federal-state programs of Aid to the Aged, Blind, or Disabled in a manner inconsistent with various federal regulations and with the Fourteenth Amendment. The District Court granted a permanent injunction requiring the state officials to comply with the federal law and also ordered the state officials to pay benefits that had been wrongfully withheld. The Supreme Court agreed that *Young* permitted "that part of the District Court's judgment that prospectively enjoined [the state officials] from failing to process applications within the time limits established by the federal regulations," *id.* at 664, but the Court held that *Young* did not permit the awarding of retroactive benefits, even if characterized as equitable restitution.

*Edelman* made it clear that the type of relief that can be granted under the *Young* exception to the Eleventh Amendment is limited. It noted that "[t]he relief awarded in *Ex parte Young* was prospective only; the Attorney General of Minnesota was enjoined to conform his future conduct of that office to the requirement of the Fourteenth Amendment." *Id.* at 664. *Young*, therefore, clearly permits injunctive relief to compel state officials to comply with federal law, even if the cost of that future compliance requires the expenditure of money by the state. The "ancillary effect" on the state treasury in such cases is simply the consequence of state officials being forced to comply with federal law under a *Young* injunction. *Id.* at 668. The Court set forth its position as follows:

> Though a § 1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to *prospective injunctive relief*, *Ex parte*, *Young*, *supra*, and may not include

> a retroactive award which requires the payment of funds from the state treasury, *Ford Motor Co.* v. *Department of Treasury, supra.*

*Id.* at 677 (emphasis added).

As the Court later pointed out in *Milliken* v. *Bradley*, 433 U.S. 267 (1977), *Edelman* "held that suit was proper to the extent it sought 'payment of state funds . . . as a necessary consequence of *compliance in the future* with a substantive federal-question determination. . . .'" *Milliken*, 433 U.S. at 289 (emphasis added). The *Milliken* Court described this exception to the Eleventh Amendment as the "prospective-compliance exception" that "had its genesis in *Ex parte Young*." *Id.*

It is the power given federal courts under *Young* to grant injunctive relief, prospective in nature, against state officials to force compliance with federal law, that carries with it the power to issue additional orders, so long as they are ancillary to the injunction, without violating the Eleventh Amendment bar. For example, in *Hutto* v. *Finney*, 437 U.S. 678, 691 (1978), the Court pointed out that "the . . . power to impose a fine is properly treated as ancillary to the federal court's power to impose injunctive relief."

This brings us to *Quern* and the "notice relief" authorized by that decision. Following the Supreme Court's remand in *Edelman*, the District Court ordered the state officials to send to each member of the plaintiff class a notice that informed the recipient, in pertinent part, that "you were denied public assistance to which you were entitled in the amount of $————." *Jordan* v. *Trainor*, 405 F. Supp. 802, 809 (N.D. Ill. 1975). The mailing containing the notice also included a returnable "Notice of Appeal," which stated in relevant part that "[t]he department illegally delayed in the processing of my AABD application, and, as a consequence, denied me benefits to which I was and am entitled." *Id.* at 810. The Seventh Circuit Court of Appeals, sitting en banc,

reversed the District Court's order on the ground that it constituted a "money judgment against the state" and, therefore, controverted the Eleventh Amendment. *Jordan* v. *Trainor*, 563 F.2d 873, 875 (7th Cir. 1977). The Court of Appeals reasoned that the language of the notice ordered by the District Court was objectionable in that it ordered, "in effect, the payment of state funds by retroactive award to the members of the plaintiff class for past action or inaction by the State of Illinois." *Id.*

The Seventh Circuit did hold, however, that on remand the District Court could order the state officials to send a "mere explanatory notice to applicants advising them that there is a state administrative procedure available if they desire to have the state determine whether or not they may be eligible for past benefits. A simple returnable notice of appeal form could also be provided." *Trainor*, 563 F.2d at 875. The Supreme Court affirmed the en banc decision of the Seventh Circuit. *Quern* v. *Jordan*, 440 U.S. 332 (1979). Before reaching the pertinent issue in *Quern*, the Court restated the principles upon which its decision was based:

> In *Edelman* we reaffirmed the rule that had evolved in our earlier cases that a suit in federal court by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. 415 U.S., at 663; see *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U.S. 573 (1946); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945); *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47 (1944). We rejected the notion that simply because the lower court's grant of retroactive benefits had been styled "equitable restitution" it was permissible under the Eleventh Amendment. But we also pointed out that under the landmark decision in *Ex parte Young*, 209 U.S. 123 (1908), a federal court, consistent with the Eleventh Amendment, may enjoin

> state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury. 415 U.S., at 667-668; see *Milliken* v. *Bradley*, 433 U.S. 267, 289 (1977); *Scheuer* v. *Rhodes*, 416 U.S. 232, 237 (1974). The distinction between that relief permissible under the doctrine of *Ex parte Young* and that found barred in *Edelman* was the difference between prospective relief on one hand and retrospective relief on the other.

*Quern*, 440 U.S. at 337 (footnote omitted).

The *Quern* Court was of the opinion that the notice relief approved by the Seventh Circuit "falls on the *Ex parte Young* side of the Eleventh Amendment line rather than on the *Edelman side.*" 440 U.S. at 347. In rejecting petitioner's argument "that giving the proposed notice will lead inexorably to the payment of state funds for retroactive benefits and therefore it, in effect, amounts to a monetary award," the *Quern* Court pointed out that the chain of causation linking the federal court's notice relief with any monetary award "contains numerous missing links, which can be supplied, if at all, only by the state and members of the plaintiff class and not by a federal court." *Quern*, 440 U.S. at 347. The Court further characterized the notice relief as follows:

> *The notice approved by the Court of Appeals, unlike that ordered by the District Court, is more properly viewed as ancillary to the prospective relief already ordered by the court.* See *Milliken* v. *Bradley*, 433 U.S. at 290. The notice in effect simply informs class members that their federal suit is at an end, that the federal court can provide them with no further relief, and that there are existing state administrative procedures which they may wish to pursue.

*Quern*, 440 U.S. at 349 (emphasis added).

Although the Justices sharply disagreed on the question of whether a state is a "person" for purposes of 42 U.S.C. § 1983, all were in agreement that the notice relief in *Quern* was ancillary to the prospective relief already ordered. "The Court today correctly rules that the explanatory notice approved by the Court of Appeals below is 'properly viewed as ancillary to . . . prospective relief.'" 440 U.S. at 350 (Brennan, J., concurring); "the explanatory notice approved by the Court of Appeals clearly is ancillary to prospective relief." 440 U.S. at 366 (Marshall, J., concurring).

B.

In the present cases, plaintiffs, as a result of the change in federal law and defendant's conformance to the federal law, no longer had any ground for an injunction to prevent defendant from violating plaintiffs' rights under federal law, nor did they any longer seek such an injunction. The fundamental requirement of the *Young* doctrine, ongoing conduct by a state official allegedly in violation of federal law, that would have empowered the District Court to issue an injunction to force compliance with federal law as an exception to the jurisdictional bar of the Eleventh Amendment was simply no longer present. Thus, at the time the District Court dismissed the complaints, the foundation that supports the granting of ancillary orders against state officials without violating the Eleventh Amendment—the basic injunction to force compliance with federal law—was not present under the circumstances of these cases.

Without the foundation of a *Young* injunction to support a notice order, plaintiffs in the present cases nevertheless sought to have the District Court declare that the past conduct of the defendant state official had violated federal law for the sole purpose of ordering the state official to send *Quern*-type notices to members of the putative classes. Plaintiffs contend that the notice relief they seek could have been ordered consistent with the

Eleventh Amendment because, as they argue, "[d]espite its apparently more expansive text, the Eleventh Amendment has long been held to be a bar only to money judgments and not to injunctive relief against the states. *Edelman* v. *Jordan*, 415 U.S. at 663, citing cases." [12] This reading of *Edelman*, however, has been expressly rejected by the Court in *Cory* v. *White*, 457 U.S. 85 (1981), in which the Court said,

> [Edelman] involved a suit against state officials claiming that their administration of a particular federal-state program was contrary to federal regulations and the Constitution. Among other things, the plaintiffs sought a judgment for benefits that had not been paid them. The case was against individual officers who allegedly were violating federal law, and it therefore arguably fell outside the reach of the Eleventh Amendment under *Ex parte Young*, 209 U.S. 123 (1908). *Edelman* held, however, that the case was in effect a suit against the State itself because a judgment payable from state funds was demanded. It was correctly noted that *Ford Motor Co.* v. *Department of the Treasury*, 323 U.S. 459 (1945), was authority for this result.
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> *Edelman* did not hold, however, that the Eleventh Amendment never applies unless a judgment for money payable from the state treasury is sought. It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought. The Eleventh Amendment reads: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State. . . ." Thus, the Eleventh Amendment by its terms clearly applies

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[12] Appellants' Brief, at 11-12.

> to a suit seeking an injunction, a remedy available only from equity. To adopt the suggested rule, limiting the strictures of the Eleventh Amendment to a suit for a money judgment, would ignore the explicit language and contradict the very words of the Amendment itself. *Edelman* did not embrace, much less imply, any such proposition.

*Id.* at 90-91 (footnote omitted).

It is only through the fiction of *Young* that injunctions may be issued against state officials and only when it is alleged that they are acting in a manner contrary to federal law. As the fiction creates the exception to the Eleventh Amendment bar, it also limits the remedies that can be awarded. A *Quern*-type order, when it does nothing more than advise plaintiffs of the Court's issuance of a *Young* injunction and administrative remedies that might be available to plaintiffs, is deemed ancillary to the Young relief permitted by the Eleventh Amendment. Consistent with the fiction of *Young*, an order compelling a state official to send such notices—if it is ancillary to the *Young* injunction and prospective in its application—is still not an action against the state itself.

It is not enough that the requested orders in the present cases would have operated "prospectively" in the same sense that the notice in *Quern* was "prospective," that is, compelling future action that did not involve an invasion of the state treasury for the purpose of payment for past wrongdoing. Even orders and injunctions against state officials that are purely prospective in this sense are subject to the prohibitions of the Eleventh Amendment. *Cory* v. *White*, 457 U.S. 85 (1981). To escape the bar of the Eleventh Amendment, an order against state officials must be both "prospective" *and* ancillary to a *Young* injunction ordering state officials to comply with federal law—the "prospective-compliance exception." *Milliken*, 433 U.S. at 289. Because it is the fiction of *Young* that shelters such ancillary orders from

not being orders against the state, when the basis of that fiction—the need for injunctive relief to force state officials to comply with federal law—disappears, so does the shelter.

Plaintiffs argue that the "ancillary" statement at the end of the *Quern* opinion was an "afterthought," and that the Court did not intend to require that notice relief be ancillary to a *Young* injunction previously ordered. While it is true that the Court has not always been consistent in its use of this word in Eleventh Amendment jurisprudence,[14] we do not view the statement as a thoughtless comment. To the contrary, for the reasons stated, the Court's finding of ancillarity was needed to bring the order within the penumbra of the *Young* doctrine.

Finally, plaintiffs contend that if *Quern* requires notice relief to be "ancillary" to other prospective relief, then the notice relief requested in the present case could be considered ancillary to the preliminary injunction entered in *Banas* or to the declaratory judgments sought in both *Banas* and *MWRO*. The difficulty with this suggestion is that both remedies are inadequate to support the additional orders requested by plaintiffs. The *Banas* injunction was expressly modified so that it would have no prospective effect after the change in law became effective on October 1, 1981. After that date, there was no conduct in violation of federal law to be enjoined, and thus the injunctive relief, which may have served as the predicate for an order requiring notice relief, had been eliminated. Any declaratory judgment in these cases would concern only the past conduct of the state official, a finding, in retrospect, that certain activities of the

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[14] *Young* injunctions are permissible even though there is "an ancillary effect on the state treasury," *Edelman*, 415 U.S. at 668; a fine and attorney's fees are properly treated as "ancillary to the federal court's power to impose injunctive relief," *Hutto*, 437 U.S. at 691; notice relief is "ancillary to the prospective relief already ordered by the court." *Quern*, 440 U.S. at 349.

state officials had previously violated plaintiffs' rights under federal law. In our view, such a declaration would not be prospective in nature, and therefore an order based solely on a declaration regarding the *past* conduct of the state official would not be an order falling within the "prospective-compliance" exception necessary to bring it "on the *Ex parte Young* side of the Eleventh Amendment." *Quern*, 440 U.S. at 347.

V.

These cases illustrate, as the Supreme Court acknowledged in *Edelman*, that "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night." 415 U.S. at 667. The Supreme Court has also very recently observed that "the theory of *Young* has not been provided an expansive interpretation," *Pennhurst*, —— U.S. at ——, 104 S. Ct. at 909, 79 L. Ed. 2d at 80, and the Court has emphasized the importance of recognizing that the principle of sovereign immunity of the states is a constitutional limitation on the federal judicial power established in Article III of the Constitution. *Id.* at ——, 104 S. Ct. at 906, 79 L. Ed. 2d at 77.

Under the unique circumstances of the present cases, we believe the District Judge was correct in his conclusion that at the time he ruled on the motions to dismiss, any further relief was barred by the Eleventh Amendment.

The judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 82-1546

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CAROL BANAS, ET AL., PLAINTIFFS-APPELLANTS

*v.*

JOHN T. DEMPSEY, DEFENDANT-APPELLEE

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MICHIGAN WELFARE RIGHTS ORGANIZATION, ET AL., PLAINTIFFS-APPELLANTS

*v.*

JOHN T. DEMPSEY, DEFENDANT-APPELLEE

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[Filed Aug. 22, 1984]

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Before: LIVELY, Chief Judge; JONES, Circuit Judge; and HOLSCHUH, District Judge.

**JUDGMENT**

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed.

Each party shall bear their own costs on appeal.

ENTERED BY ORDER
OF THE COURT
JOHN P. HEHMAN
Clerk

/s/ John P. Hehman
Clerk

Issued as Mandate: October 30, 1984

Costs: None

# UNITED STATES COURT OF APPEALS
# FOR THE SIXTH CIRCUIT

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No. 82-1546

---

CAROL BANAS, ET AL., PLAINTIFFS-APPELLANTS

*vs.*

JOHN T. DEMPSEY, DEFENDANT-APPELLEE

---

MICHIGAN WELFARE RIGHTS ORGANIZATION, ET AL., PLAINTIFFS-APPELLANTS

*vs.*

JOHN T. DEMPSEY, DEFENDANT-APPELLEE

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[Filed Oct. 18, 1984]

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Before: LIVELY, Chief Judge; JONES, *Circuit Judge*; HOLSCHUH, District Judge *

**ORDER DENYING PETITION FOR REHEARING EN BANC**

A majority of the Court having not voted in favor of an en banc rehearing, the petition has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER
OF THE COURT

/s/ John P. Hehman
Clerk

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* The Honorable John D. Holschuh, Judge of the United States District Court for the Southern District of Ohio, sitting by designation.

SUPREME COURT OF THE UNITED STATES

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No. 84-6270

JOHNNY GREEN, ET AL., ETC., PETITIONERS

*v.*

AGNES MARY MANSOUR, Director, Michigan Department of Social Services

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 1, 1985